SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 153

TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, INDIVIDUALLY AND COLLECTIVELY, THE MONROE AVENUE CHURCH OF CHRIST, A CORPORATION, AND LLOYD C. DICKERSON, PETITIONERS,

vs.

FRED C. PERKINS, EARL McCULLOUGH, DRELL MURLETTE, G. P. MOHR, MILDRED MERCURIO AND MOLLEY E. VICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 11, 1947.

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[fols. 1-2]

IN THE SUPREME COURT OF OHIO, JANUARY TERM, 1947

No. 30931

Title of Case

FRED C. PERKINS et al., Plaintiffs-Appellees

vs.

TRUSTEES OF MONROE AVENUE CHURCH OF CHRIST, INDIVIDUALLY AND COLLECTIVELY, Defendants-Appellants

Attorneys

Davis & Davis, 50 West Broad Street, Columbus, Ohio.
Frank C. Shearer, 1074½ Mt. Vernon Avenue, Columbus, Ohio.
David D. White, 165 South High St., Columbus, Ohio.

Action

Appeal from the Court of Appeals of Franklin County.
Motion for an order Directing the Court of Appeals of Franklin County to certify its record.

MEMORANDA OF PLEADINGS, &C FILED, WRITS ISSUED, &C

Dec. 26, 1946. Notice of Appeal & proof of Service filed.
Jan. 4, 1947. Motion for an order to certify record & proof of Service filed.
Jan. 6, 1947. Court of Appeals transcript, Original Papers & Bill of Exceptions filed.
Jan. 14, 1947. Entry extending time for filing appellant's brief herein to January 24, 1947. Carl V. Weygandt, C. J. J. 38-297.
Jan. 24, 1947. Cause docketed on appeal as of right.
Jan. 24, 1947. Appellant's printed brief & affidavit of Service filed. 1/29/47 Proof of Service filed.
Feb. 5, 1947. Motion by appellees to dismiss appeal as of right and Proof of Service filed.
Feb. 13, 1947. Leave to file Appellees brief instanter filed.
Feb. 13, 1947. Appellee's printed brief & Affidavit of Service filed. 2/15/47 Proof of Service filed.

Feb. 18, 1947. Entry granting The American Civil Liberties Union leave to file brief Amicus Curiae herein. Carl V. Weygandt, C. J. J. 38-323.

Feb. 20, 1947. Printed brief Amicus Curiae of American Civil Liberties Union & Affidavit of Service filed. 2/24/47 Proof of Service filed.

Feb. 26, 1947. Answer brief of Appellees to Brief of American Civil Liberties Union filed. (9)

Feb. 28, 1947. 3 additional copies of answer Brief of Appellees filed.

[fol. 3] Mar. 5, 1947. Motion by Appellee to dismiss appeal as of right. Sustained. J. 38-337.

March 5, 1947. Motion for an order directing the Court of Appeals of Franklin County to certify its record. Overruled. J. 38-338.

Mar. 5, 1947. Dismissed, No debatable constitutional question involved. J. 38-339.

Mar. 12, 1947. Notified application for rehearing to be filed.

Mar. 19, 1947. Application for rehearing filed.

Mar. 26, 1947. Rehearing Denied. J. 38-356.

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JOURNAL ENTRIES

30931. Tuesday, January 10, 1947. Entry. Upon application of appellants, and for good cause shown, it is ordered that the time for filing appellant's brief on motion to certify herein be, and the same hereby is, extended to January 24, 1947. Carl V. Weygandt, C. J. J. 38-297.

30931. Tuesday, February 18, 1947. Entry. Upon application and for good cause shown, it is ordered that Milton L. Farber and others are hereby given leave to file brief amicus curiae herein on behalf of The American Civil Liberties Union. Carl V. Weygandt, C. J. J-38-323.

30931. Wednesday, March 5, 1947. Motion for an order directing the Court of Appeals of Franklin County to certify its record. It is ordered by the Court that this motion be, and the same hereby is, overruled. J. 38-338.

30931. Wednesday, March 5, 1947. Motion by appellees to dismiss appeal filed as of right. It is ordered by the Court that this motion be, and the same hereby is, sustained. J. 38-337.

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30931. Wednesday, March 5, 1947. Appeal from the Court of Appeals of Franklin County. This cause came on to be heard upon the transcript of the record of the Court of Appeals of Franklin County, upon the motion of the appellees to dismiss the appeal, filed as of right herein, and was argued by counsel. On consideration whereof, it is ordered and adjudged that said appeal be, and the same hereby is, dismissed for the reason no debatable constitutional question is involved in said cause. It is further ordered and adjudged that the appellees recover from the appellants their costs herein expended, taxed at $——. Ordered, That a special mandate be sent the Court of Common Pleas of Franklin County, to carry this judgment into Execution. [fol. 4] Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Franklin County, for entry. J. 38-339.

30931. Wednesday, March 26, 1947. Rehearing Docket. Upon consideration of the application for rehearing herein, it is ordered by the Court that rehearing be, and the same hereby is, denied. J. 38-356.

[fol. 5] IN THE SUPREME COURT OF OHIO

[Title omitted]

APPLICATION FOR REHEARING—Filed March 19, 1947

Now comes the defendants-appellants in the above styled cause of action, by its attorneys, and respectfully apply for a rehearing of the issues hereto have raised in their motions in the above styled cause, and for the following reasons:

(1) The Honorable Justices of the Court on the hearing on the motions did not find as the defendants-appellants believed they should have found that there is a debatable constitutional question involved;

(2) That the Honorable Justices of the Court did not find as the defendants-appellants believed they should have found that the questions involved are of great and general public interest.

Conclusion

In conclusion we respectfully urge that the Court reconsider the appeal and motions of the defendants-appellants for the defendants-appellants are entitled to have said motions sustained and to have the final judgment in their favor.

(Signed) Frank C. Shearer, David D. White, Attorneys for the defendants-appellants.

[File endorsement omitted.]

[fol. 6] In the Supreme Court of the State of Ohio

[Title omitted]

Motion to Dismiss Appeal as of Right—Filed February 5, 1947

Now come the Plaintiffs Appellees, Fred C. Perkins et al., and move the Court to dismiss the appeal as of right filed herein for the reason that there is no debatable constitutional question involved in this proceeding.

(Signed) Davies & Davies, Attorneys for Plaintiffs-Appellees.

Notice of Motion

Defendants Appellants will take notice that the Plaintiffs Appellees have filed in the above entitled cause a motion to dismiss the appeal filed as of right. Said motion will be heard on Feb. 27, 1947.

(Signed) Davies & Davies, Attorneys for Plaintiffs-Appellees.

Proof of Service

Defendants Appellants hereby acknowledge receipt of a copy of the foregoing motion to dismiss appeal and notice.

(Signed) Frank C. Shearer, Attorney for Defendants-Appellants.

[File endorsement omitted.]

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[fols. 7-8] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 24, 1947

Now comes the Monroe Avenue Church of Christ and Lloyd L. Dickerson, defendants-appellants, and for their assignments of error herein, say that:

1. The Court of Appeals erred in refusing to hold that the purported contract, which the plaintiffs-appellees sought to enforce, was invalid and void;

2. The Court of Appeals erred in attempting to separate the provisions of the contract and in treating the contract as having two parts;

3. The Court of Appeals erred in refusing to hold that the purported contract was a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States and was a violation of Article I, Section 1, of the Constitution of the state of Ohio;

4. And that the judgment of the Court of Appeals and the Common Pleas Court of Franklin county, Ohio, is contrary to law.

[File endorsement omitted.]

[fol. 9] IN THE SUPREME COURT OF OHIO

[Title omitted]

MOTION FOR AN ORDER TO CERTIFY THE RECORD—Filed January 4, 1947

Now comes the Trustees of Monroe Avenue Church of Christ, etc., Defendants-Appellants herein and represent that on the sixth day of December, 1946, in an action pending in the Court of Appeals of Franklin County, Ohio, and known as case No. 3934 on the docket of said Court, wherein the Appellants herein were the Appellants, and Fred C Perkins et al., were the Appellees, said Court rendered a judgment in favor of the said Appellees and against the Appellants herein affirming a judgment rendered in favor

of said Appellees in the Court of Common Pleas of Franklin County, Ohio. A copy of the brief, containing a statement of the questions presented, and a statement of the case, a copy of the journal entry of the Court of Appeals and copies of all opinions rendered in the case as required by the rules of this Court, will be duly filed herein, and to which reference is here made.

The Defendants-Appellants further represent that they have heretofore filed their Notice of Appeal in the Franklin County Court of Appeals, and similar notice in this Court as required by law; and further, that said cause is one of public and great general interest, and that prejudicial error as intervened in the proceedings had in said Court of Appeals, all within the meaning of Article IV, Section 2 of the Constitution of the State of Ohio, and that by reason thereof, this Court has jurisdiction of said judgment and ought to review the same.

[fol. 10] Said Defendants-Appellants are also filing their assignments of error, as required by law and by the rules of this Court.

Wherefore, said Defendants-Appellants move for an order directing the said Court of Appeals to certify its record in said cause to the Supreme Court.

(Signed) Frank C. Shearer, David A. White, Attorneys for Defendants-Appellants.

Acknowledgment of Service

Service of a copy of the foregoing motion is hereby acknowledg*ment* this 4th day of January, 1947.

(Signed) Davies & Davies, Attorneys for Plaintiffs-Appellees.

[File endorsement omitted.]

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[fol. 11] IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

Transcript of Docket and Journal Entries

No. 3934

COURT OF APPEALS

THE STATE OF OHIO,
Franklin County, ss:

FRED C. PERKINS, et al., Plaintiffs-Appellees,

vs.

THE TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, etc., et al., Defendants-Appellants

1946 June 28th Transcript of Docket and Journal Entries filed in Common Pleas Court. Papers to-wit: Pr-ecipe 1, Notice of Appeal 1, Transcript 1. See Case No. 3926 C. of A. for original papers.

1946 July 8th. Bill of Exceptions filed.

1946 July 11th. Motion for Extension of time filed.

1946 July 11th. Extension of time allowed as per Entry 7-300.

1946 Sept. 5th. (3) Briefs and Assignment of Errors filed.

1946 Sept. 5th. Motion for Extension of Time filed.

1946 Sept. 5th. Extension of time granted as Per Entry 7-311.

1946 Sept. 20th. (3) Answer Brief of Plaintiffs-Appellees filed.

1946 Oct. 7th. Leave granted American Civil Liberties Union to file Amicus Curiae 7-324.

1946 Oct. 7th. Columbus Council for Democracy by David Clayman, allowed to file Briefs Amicus Curiae, concur-ing with American Civil Liberties Union as per Entry 7-325.

1946 Oct. 7th. (3) Briefs in Answer to Briefs of American Civil Liberties Union filed.

1946 Oct. 30th. Judgment Reversed in part and affirmed in part. Exceptions as per Decision.

1946 Nov. 21st. Application for Rehearing Denied as Per Decision.

1946 Dec. 6th. Judgment affirmed in part and Judgment Reversed in Part as Per Entry 7-351.

1946 Dec. 6th. Mandate issued & filed 6-475.

1946 Dec. 26th. Notice of Appeal to Supreme Court filed.

1947 Jan. 6th. Pr-ecipe of Docket and Journal Entries to S. S. Court filed.

[fol. 12] [Caption Omitted]

No. 3934
Filed July 11, 1946
Book 7, Page 300
Entry

This cause came on to be heard on Motion of the Appellants herein for extension of time for filing of Assignments of Errors and Briefs, upon consideration whereof the Court finds that said Motion is well taken and should be allowed.

It is therefore hereby ordered that the time for filing Assignment of Errors and Briefs of the Appellants in the above entitled action shall be extended to September 1, 1946.

Fred J. Miller, Judge.

Approved: Frank Shearer, Attorney for Appellants.

[Caption Omitted]

No. 3926
Filed July 11, 1946
Book 7, Page 300
Entry

This cause came on to be heard on Motion of the Appellants herein for extension of time for filing of Assignment of Errors and Briefs, upon consideration whereof the Court finds that said Motion is well taken and should be allowed.

It is therefore hereby ordered that the time for filing Assignment of Errors and Briefs of the Appellants in the above entitled action shall be extended to September 1, 1946.

Fred J. Miller, Judge.

Approved: Davies & Davies, Attorneys for Appellants. Frank Shearer, Attorney for Appellees.

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[Caption Omitted]

No. 3934
Filed Sept. 5, 1946
Book 7, Page 311
Entry

This cause came on to be heard on Motion of the Appellants herein for extension of time for filing of Assignment of Errors and Briefs, upon consideration whereof the Court finds that said motion is well taken and should be allowed.

It is therefore hereby ordered that the time for filing Assignment of Errors and Briefs of the Appellants in the above entitled action shall be extended to September 5, 1946.

Fred J. Miller, Judge.

Approved: Davies & Davies, Attorneys for Appellees. Frank Shearer, Attorney for Appellants.

[fol. 13] [Caption Omitted]

No. 3926
Filed Sept. 27, 1946
Book 7, Page 320
Entry

This matter coming on to be heard on the application of Edmund B. Paxton, an Attorney-At-Law, for permission to file a brief Amicus Curiae in this cause, the court being advised in the premises, finds that said application should be granted.

It is therefore ordered that the said Edmund B. Paxton file his brief Amicus Curiae, and that he serve each party with a copy of the same.

Fred J. Miller, Judge.

Davies & Davies, Attorneys for Plaintiffs-Appellants. Frank Shearer & David White, Attorneys for Defendants-Appellees.

[Caption Omitted]

No. 3934
Filed Oct. 7, 1946
Book 7, Page 324
Entry

On agreement of the parties herein, and for good cause shown, The American Civil Liberties Union is hereby granted leave to file a brief Amicus Curiae in this case.

Clyde Sherick, P. Judge.

Approved: Davies & Davies, Attorneys for Plaintiffs-Appellees. Frank C. Shearer & Milton L. Farber, Attorneys for Defendants-Appellants & American Civil Liberties Union.

[Caption Omitted]

No. 3934
Filed Oct. 7, 1946
Book 7, Page 325
Entry

Upon oral motion of the Columbus Council for Democracy, made through its Attorney, David Clayman, and upon the showing that said Columbus Council for Democracy and its Attorney, David Clayman, were under the impression that the instant case would be heard at a date later than the present, and therefore are unprepared to request of the Court that the Columbus Council for Democracy be allowed to file a brief for defendants-appellants as amicus curiae, and upon the showing that the said Columbus Council for Democracy is deeply interested in the issues involved herein, and is desirous of taking part in the cause herein, now therefore be it ordered by the Court that the Columbus Council for Democracy be designated as [fol. 14] amicus curiae in the cause herein and that it be indicated that the said Columbus Council for Democracy concurs with the brief filed by the defendants-appellants and with the brief filed by the American Civil Liberties Union as amicus curiae.

Clyde Sherick, P. Judge.

Approved: David Clayman, Attorney for Columbus Council for Democracy.

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[Caption Omitted]

Nos. 3926 & 3934
Filed Dec. 6, 1946
Book 7, Page 351
Entry

JUDGMENT

These causes came on for hearing as appeals on questions of law from the Court of Common Pleas, Franklin County, Ohio, upon the assignments of error, transcripts of the docket and Journal entries of said Common Pleas Court, and the bill of exceptions including the original papers filed in said Common Pleas Court and were argued by counsel.

On consideration thereof, the court finds that in Cause No. 3926, said Common Pleas Court erred in passing upon the question of the validity of covenant against sale or conveyance to any person or persons of any race other than the Caucasian contained in the deed to the premises here in question and it- failure to dismiss that branch of Plaintiffs-Appellants' case which deals with said covenant for the reasons that a declaratory judgment was not asked for and under the State of the pleadings and proof the question as to such covenant was not made, the Court further finds that in Cause No. 3934, there was no error in that portion of the judgment of said Common Pleas Court relative to the covenant against the use and occupancy by any person or persons of a race other than the Caucasian contained in said deed and that said portion of the judgment should be affirmed.

These causes then further came on to be heard on an application by Defendants-Appellees-Appellants for a rehearing of said causes and the court finds that said application is not well taken and should be denied.

Coming now Cause No. 3926, it is therefore hereby ordered adjudged and decreed that that portion of the judgment of the court below wherein said court held that that portion of the restrictive covenant contained in the deed here in [fol. 15] question which forbade the sale and conveyance of Lot No. Six (6), Hutcheson Heirs Addition, and known as 93 N. Ohio Avenue, Columbus, Ohio, to any person or persons other than Caucasian was void and unforceable and refused an injunction for the enforcement thereof, be and the same is hereby reversed. And, the court proceeding

to render the judgment which said court of Common Pleas Court should have rendered, it is hereby ordered, adjudged and decreed that the portion of Plaintiffs-Appellants' complaint which prays for a mandatory injunction enjoining Defendants-Appellees therein from selling or conveying said property to any person or persons other than of the Caucasian race, be and the same is hereby dismissed.

To which order, judgment and decree of the court Plaintiffs-Appellants except and their exceptions are hereby noted.

Coming now to Cause No. 3934, it is hereby ordered, adjudged and decreed that that portion of the judgment of said Common Pleas court holding the covenant in the deed to the aforesaid premises prohibiting use or occupancy of said premises by a person or persons other than the Caucasian race to be valid and enforceable and granting a permanent injunction against the Monroe Avenue Church of Christ against violation of said covenant be and the same is hereby affirmed. It is therefore hereby ordered, adjudged and decreed that the Monroe Avenue Church of Christ discontinue immediately the occupancy of said premises by any person or persons other than the Caucasian race and it is further hereby ordered, adjudged and decreed that said Monroe Avenue Church of Christ be, and it is hereby permanently enjoined from permitting any person or persons other than the Caucasian race to occupy said premises except as a servant of the occupant of said premises until January 1, 1960.

To which order, judgment and decree of said court Defendants-Appellants except and their exceptions are hereby noted.

It is further ordered, adjudged and decreed that in event any person or persons other than the Caucasian race is or are occupying the said premises located at 93 N. Ohio Avenue, Columbus, Ohio, on the 15th day of December, 1946, and thereafter, except as a servant of the occupant of said premises the Sheriff of Franklin County, Ohio, is hereby authorized and ordered to cause such person or persons to [fol. 16] be forthwith removed and evicted from said premises and make due return thereon.

It is further ordered, adjudged and decreed that the application for a rehearing of said causes by Defendants-Appellees and Appellants be and the same is hereby denied. To which order, judgment and decree of said court

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said Defendants-Appellees and Appellants except and their exception is hereby noted.

It is further ordered that special mandate be sent to the Court of Common Pleas, Franklin County, Ohio, for the execution of this judgment.

It is further ordered that Appellants in each cause pay the costs in their respective appeals.

Clyde C. Sherick, P. Judge.

Approved: Davies & Davies, Counsel for Plaintiffs-Appellants-Appellees.

Rejected-Objections 11-27-46.

Counsel for Defendants-Appellees & Appellants.

Received 11-27-46.

Same objections to this entry.

Frank C. Shearer, Attorney for Defendants, etc.

Clerk's Certificate to foregoing papers omitted in printing.

[fol. 17] In the Court of Appeals of Franklin County, Ohio

[Title omitted]

Notice of Appeal to Supreme Court—Filed December 26, 1946

The Defendants-Appellants hereby give notice of appeal to the Supreme Court of Ohio, on questions of law, as of right and by motion to certify from the judgment of affirmants and the final order rendered by the Court of Appeals for Franklin County, Ohio, on the sixth day of December 1946, herein.

(Signed) Frank C. Shearer, Attorney for the Defendants-Appellants.

[File endorsement omitted.]

[fol. 18] IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

[Title omitted]

ORDER DENYING APPLICATION FOR REHEARING—November 21, 1946

By the Court:

Application for rehearing denied.

Sherick, P. J., Putnam and Montgomery, JJ., of the Fifth District, sitting by designation, concur.

APPEARANCES:

Messrs. Davies & Davies, 50 W. Broad St., Columbus 15, Ohio, Attorneys for Plaintiffs, Appellants and Appellees.

Mr. Frank C. Shearer, 20th and Mt. Vernon Ave., Columbus, Ohio.

Mr. D. D. White, 165 N. High St., Columbus 15, Ohio. Attorneys for Defendants-Appellants and Appellees.

Mr. Milton L. Farber, 5 E. Long St., Columbus 15, Ohio.

Mr. Stanley U. Robinson, Jr., 5 E. Long St., Columbus 15, Ohio.

Mr. Arthur Garfield Hays, New York, N. Y.

Mr. Osmond K. Fraenkel, New York, N. Y.

Mr. John D. Connor, 8 E. Broad St., Columbus 15, Ohio.

Mr. Robert N. Gorman, 808 Traction Bldg., Cincinnati, Ohio. Attorneys for American Civil Liberties Union, Amicus Curiae.

Mr. Edmund B. Paxton, Asst. Pros. Atty., Court House, Columbus 15, Ohio, Amicus Curiae.

Mr. David Clayman, 79 E. State St., Columbus 15, Ohio. Attorney for The Columbus Council for Democracy, Amicus Curiae.

Messrs. Pretzman & Dillon, 50 West Broad St., Columbus 15, O. Attorneys for the Eastwood Civic Association, and three other like organizations, Amicus Curiae.

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[fol. 19] IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 3926 and No. 3934

FRED C. PERKINS et al., Plaintiffs, Appellants and Appellees,

vs.

TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, INDIVIDUALLY AND COLLECTIVELY, Defendants, Appellees and Appellants

DECISION—October 30, 1946

SHERICK, P. J., of the Fifth District, sitting by designation:

The original action, and decree entered therein, from which both plaintiffs and defendants, Church and its Trustees, appeal, was to enjoin the Church from selling or conveying the premises over which the controversy rages to any person other than a Caucasian, and to evict one Lloyd L. Dickerson, the negro pastor of this church, therefrom, and to forbid the future occupancy and use of the premises, now occupied as the church parsonage, by any other person other than a Caucasian.

It is at once apparent that plaintiff's complaint is twofold: the first involves ownership and future sale; the second, present occupancy and future use. The suit is grounded and relief sought upon a certain restrictive covenant appearing in the church's chain of title. The Trial Court concluded, that, that portion of the covenant dealing with sale and conveyance was against public policy and contrary to law and was therefore void and unenforceable and disallowed an injunction; but held that portion of the restrictive covenant, which dealt with occupancy and [fol. 20] use, in accordance with law. It ordered eviction of Dickerson, and enjoined the church from the subsequent use and occupancy by any one other than a person of the Caucasian race.

The defendant, Church, answers the complaint, and sets up some seven defenses. It asks for no affirmative relief, but requests that plaintiffs' petition be dismissed. It is well to note at this point that plaintiffs do not plead that defendant, Church, contemplates or threatens a subsequent sale of the premises to any person other than a member of

the Caucasian race. The ultimate facts as shown by the pleadings and evidence disclose the following:

In 1926 the owners of 29 lots on Ohio Avenue in Columbus, Ohio, being all of the lots within certain bounds, mutually agreed upon a plan to restrict the sale, use and occupancy of their properties. They all quit-claimed their respective holdings to The Guarantee Title & Trust Company, which thereafter re-conveyed back to each owner his respective lot. Each of these deeds of re-conveyance was duly recorded. They all contain the following covenant:

> "Said grantee, as a part of the consideration for this conveyance, and for the mutual benefit of all of the owners of the lots on the east and west sides of North Ohio Avenue, between the first alley south of East Broad Street and the first alley south of East Long Street, and of every other present and subsequent owner of a lot or lots in the territory above described for himself and his heirs, hereby covenants and agrees with the said grantor herein, its successors and assigns, that at no time prior to January 1, 1960, shall any lot or part of a lot, or interest in any of the premises located on Ohio Avenue, as aforesaid, be leased, rented, sold or conveyed to any person or persons of any race other than Caucasian, nor shall any such person or persons other than Caucasian be permitted to occupy the same during that period, except as a servant of the occupant of any of said premises.
>
> And it is expressly agreed that if said grantee, his heirs, executors, administrators or assigns, or anyone holding or claiming by, through or under any of them, shall violate this condition, then these presents and this conveyance shall become null and void, and all the right, title, interest and estate in said premises shall immediately revert to and be revested in the grantor hereof, its successors and assigns, and it shall be seized as of its former estate herein as if these presents had never been executed, and may immediately re-enter, re-possess and hold said premises as of a good estate in [fol. 21] fee simple, and the grantor hereof hereby gives and grants to the present owners of any or all of the other lots in the location fronting on Ohio Avenue in the territory above described, their heirs, executors, administrators and assigns, on a violation of the

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condition or restriction aforesaid, the right by proper legal proceedings to enforce the above condition, restriction and reversion. And the grantee hereof, by accepting this deed agrees to and with any or all of the owners of the other lots or parcels fronting on Ohio Avenue in the territory above described, their heirs, administrators, executors and assigns, that they or anyone or more of them may enforce by proper legal proceedings the aforesaid condition, restrictions and reversion; and the above condition and restriction shall until January 1, 1960, be considered as running with the aforesaid real estate hereby conveyed and shall be made a part of all deeds and conveyances, instruments, leases, transfers, assignments and agreements made by the said grantee, his heirs, executors, administrators or assigns, or any of them of said premises."

"This deed has been executed pursuant to a general plan for the establishment of a highly restricted neighborhood and for the improvement and betterment of all the lots hereinbefore described and the covenants in this deed are entered into as a part of a general plan for the benefit of each lot owner, therefore the grantor and grantee herein covenant, with all deeds, conveyances and contracts of sale for said lots shall recite the conditions and restrictions herein contained."

On or about June 29, 1945, Lot No. 6, having thereon a single residence, was owned and conveyed by Amelia Cipriano to Constance Conners, who on the same day conveyed it to a Realty Company, which in turn conveyed it to the defendant, Church, an Ohio Corporation not for profit. The Church congregation is largely made up but not entirely so of colored people. Dickerson took part in the purchase negotiations. He knew of the deed restrictions. The Church and its negotiating agents had at least constructive notice thereof from the recorded deeds in its chain of title.

First, we shall consider the claim of plaintiffs-appellants in that the trial Court erred in holding that plaintiffs were not entitled to an injunction restraining the Church from selling and conveying lot No. 6 to any person other than a Caucasian. It is the judgment of this Court that the trial [fol. 22] Court did err in passing upon this question, and

in its failue to dismiss this branch of plaintiffs' case in accordance with the prayer of defendants' answer, for the reason that a declaratory judgment was not asked for, and under the state of the pleadings and the proof, the question was not made. As previously pointed out there was no threatened sale in the offing, contra to the restrictive covenant; and for the further reasons that defendants' uncontroverted fourth defense was a complete and sufficient answer to plaintiffs' claimed impropriety of defendants' purchase and ownership of Lot No. 6. The fourth defense reads:

> "Defendants further answering say that the corporation, defendants herein, has no racial identity because the corporation is an entity separate and apart from the members thereof."

Whether a corporation for profit or not for profit be the creature of fact or fiction, it is as said in Fletcher's Cyclopedia Corporations, Per. Ed. Vol. 1, Section 25 at Page 84, that,

> "Artificial personality is a corporate attribut- * * *. It is generally accepted that the corporation is an entity distinct from the shareholders or members and with rights and liabilities not the same as theirs individually and severally * * *."

This authority further states, Vol. 1, Sec. 28, Page 105, that "its members, as natural persons are merged in the corporate identity". In Sec. 31, Page 111, it is further observed, that "the property of a corporation is its property and not that of the stockholders, as owners", even though such stockholders or members may have some equities in it.

The high Court of this state has again recently said, in Voeller v. Warehouse Company, 136 O. S., 427, 432, that:

> "A stockholder and a corporation of which he is a member, are separate and distinct persons in law, and their interests are always distinct and sometimes adverse."

Stockholders and members of most corporations are constantly changing. The entrance and exit of new and old members or stockholders in no wise affect the title or owner-

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[fol. 23] ship of corporate property. It ought to be clear that a corporation as a legal entity can have no racial edentity. The defendant, Church, has a mixed congregation. It was not a non-Caucasian or a negro, within contemplation of law. Nowhere within the restriction covenant do we find that it contemplated non-sale of restricted property to a corporation composed in whole or in part of non-Caucasian stockholders or members. We believe it well settled that it is not the policy of either courts of law or equity to enlarge restrictive covenants to embrace matters therein which are not specifically contemplated or clearly stated. We do not perceive wherein Realty Company or defendant, Church, violated any provision of the restriction covenant. Neither do we find any fact that should cause a court of equity to disregard the theory of separate entity.

The case of Peoples Pleasure Park Company v. Rohleder, 109 Va. 429; 61 S. E. 794, is directly in point. The Park Company was a corporation organized and controlled by negroes for the purpose of operating a place of amusement for colored people. It purchased a tract of ground which bore a restriction that it could not be sold to colored persons. In an action to enforce the covenant, the Court held that,

> "A restriction in the covenants of land to the effect that the title of this land is never to vest in a person or persons of African descent or colored persons is not violated by a subsequent conveyance of land to a corporation organized to establish or develop a pleasure park for the amusement of colored people. The contemplated use is not prohibited by the restriction nor is the title conveyed to a forbidden person."

The English case of Continental Tyre and Rubber Company, Limited, v. Daimler Company, Limited, King's Bench, 1915, Vol. 1, page 893, is of passing interest. Plaintiff company was incorporated in England and carried on business in London. It was subsidiary to a German corporation. All its shares, save one, were held by German subjects residing in Germany. It was held that war did not [fol. 24] change its character, even if all its shareholders were nonresident alien enemies; that having been created in accordance with law, it remained an English corporation.

We cite this case to show to what length English Courts have gone even in times of war to hold that "a stockholder and a corporation of which he is a member, are separate and distinct persons in law" as was held in Voeller v. Warehouse Company, supra.

We now come to that feature of the suit of which defendants-appellants complain in their appeal. Is the covenant against use and occupancy by non-Caucasians invalid, either in that it is contrary to law, antagonistic to Federal or State constitutional provisions, or repugnant to public policy?

This State has long held to the rule, as in Anderson v. Cary, 36 O. S., 506, that a restriction against alienation, even for a limited time, is void as repugnant to the grant and contrary to public policy. This case concerns a limitation found in a devise of property. The principle is the same as that found in the leading case of Mandlebaum v. McDonnell, 29 Mich., 78; Am. Rep. 61, wherein that illustrious Court of the three C's, Cooley, Campbell and Christiancy held, that restrictions upon alienation based upon racial characteristics, for any length of time, are void, principally for the reasons that they are repugnant to law and settled public policy. Other jurisdictions hold that a certain limitation in point of time cures the evils thereof. These remarks, of course, pertain to alienation and not to user, between which there is a marked distinction. One may own property and convey it away, yet he or his grantee may be limited in its use. It may be that liquor is forbidden to be sold on the premises, or that the structure placed thereon shall not be of a lesser value than a specified sum; or that any such building thereon shall not be closer than so many feet from the lot or street line, or that improvements shall not be of a certain character. All such restrictive covenants are matters of individual contract, which the parties have carried into their conveyancing, prompted of course by financial caution or social security as they see it.

[fol. 25] Many such instances are found in reported Ohio cases, and the courts have consistently held such restrictions to be valid; recognizing the principle that even if one does own property, he may not put it to any selected use that may suit his fancy to the detriment of his neighbor with whom he or his predecessors in title have contracted otherwise. Although our highest court has never passed on the

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question of racial occupancy restriction, it is a matter of common knowledge that it is a frequent and extensive practice throughout the State.

Ohio has no statute on the subject. The Court in State, ex rel. v. Trustees, 126 O. S., 290, voiced what ought to be a self-evident truth, that:

> "The purely social relations of our citizens cannot be enforced by law; nor were they intended to be regulated by our own laws or by the State and Federal Constitutions."

The distinction must not be lost sight of between those rights and duties that exist by virtue of private contract, from those which grow out of specific statutory recognition of public relationship. Examples of the latter are found in laws requiring innkeepers and restaurant proprietors to accommodate the public irrespective of race or color. See Sections 12940 and 12941.

Comparisons are odious; none are intended. Only for the purpose of developing that which is glaringly obvious, we inquire; Would anyone gainsay that one allotting and selling property for strictly residential purposes might not legally write into conveyances for the benefit of the purchasers and their assigns, a restrictive covenant against letting a property therein to be occupied and used as a house of prostitution? The absurdity of an affirmative answer, negates the question. Yet even prostitutes are a class of our citizenry. If one class may by contract be denied the privilege of use and occupancy, why not another? White may exclude black. Black may exclude white.

It is written in 14 Amer. Jur., 168, Sec. 208, that:

> [fol. 26] "All courts agree that a condition or covenant that property shall not be occupied by persons of certain races is not invalid as a restraint upon the alienation of the property • • •."

Even Michigan, which pioneered, in Mandlebaum v. McDonnell, supra, holds in Schulte v. Starks, 238 Mich., 102, 213 N. W. 102, that although a restrictive covenant against alienation to a person of color is void, a restraint upon use and occupancy by a colored person is valid and enforce-

able. In the earlier case of Parmalee v. Morris, 218 Mich., 625; 188 N. W., 330, 331, 38 A. L. R. 1180, the Court said:

> "The law is powerless to eradicate instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents."

To the same effect, see Ridgway v. Cockburn, 196 N. Y. S., 936; 163 Misc. 511, wherein it is said in the 9th syllabus, that,

> "It is not contrary to public policy for any group of individuals to contract among themselves for the exclusive enjoyment of their own private property."

The Ohio Supreme Court in Railway Company v. Cox, 55 O. S. 497, 515, has taken a like stand. It says, that,

We well recognize that vociferous minorities of our citizens, instigated by politicians, not statesmen, clamor for judicial denial of private rights under the guise of public welfare which is to say public policy; but the courts ought to be and are ever mindful of that basic thought which underlies representative democracy, "give all power to the many and they will oppress the few, give all power to the few and they will oppress the many, so that each should retain within themselves the power for their own self-preservation." And that reservoir of protection is to be found in our guaranty of constitutional rights, per example, the right to private contract; and that hesitancy of the [fol. 27] courts to be swayed by that which is seemingly popular for the moment, but finds little or no sound reason or precedent, either in law or equity.

Without gathering all the cases supporting the holdings of the Supreme Court of Michigan in the last two cases cited, we would direct attention to some few authorities:

White v. White, 108 W. Va., 125; 150 S. E. 531; 66 A. L. R. 518;
Wayt v. Patee, 205 Cal., 46; 269 Pac. 660;
Los Angeles Investment Co. v. Gary, 181 Cal., 680; 9 A. L. R. 115; 186 Pac. 596;

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Meade v. Dennistone, (Court of Appeals, 1/11/38), Maryland; 196 Atl. 330; 114 A. L. R., 1227.

Defendants-appellants urge that the restriction against use and occupancy violates the 14th Amendment of the Federal Constitution, and Article I, Section 1, of the State Constitution. Corrigan v. Buckley, 271 U. S., 323, 330; 70 L. Ed., 969, 972, ought to and does dispose of this oft asserted and indefensible claim. Syllabus 4 of this authority unequivocally announces,

> "• • • the prohibitions of the Fourteenth Amendment have reference to state action exclusively, and not to any action of private individuals. • • • Individual invasions of individual rights is not the subject matter of the Amendment."

Article I, Section 1 of the State Constitution encompasses the right of private contract. A holding to the contrary would in fact place it in direct conflict with the Federal guaranty of the right of private contract.

We are told that plaintiffs failed to prove the existence of a contract supported by a consideration; that privity is lacking; that conditions have changed; that the contract is vague and uncertain; and that there was a failure to plead or prove damages. Numerous well reasoned authorities may be found denying the efficiency of such arguments and claims, all of which we find futile and of no avail.

[fol. 28] Although defendants-appellants appeal on questions of law and fact, their appeal has been treated, argued and presented as one at law. We shall so consider it. The judgment of the trial Court on the question made by plaintiffs' appeal, that is, on sale restriction, is reversed. We enter the judgment that the trial Court should have entered, that is, dismissal of this portion of plaintiffs' complaint. The judgment of the trial Court entered on defendants' appeal, that is, as to use and occupancy, is affirmed. If defendants would have it otherwise, the same judgment may be entered as was done in the trial Court. Judgment accordingly. Costs are assessed against each appellant in their respective appeals.

Putnam and Montgomery, JJ., of the Fifth District, sitting by designation, concur.

APPEARANCES:

Messrs. Davies & Davies, 50 W. Broad St., Columbus 15, Ohio, Attorneys for Plaintiffs-Appellants and Appellees.

Mr. Frank C. Shearer, 20th and Mt. Vernon Ave., Columbus, Ohio; Mr. D. D. White, 165 N. High St., Columbus 15, Ohio, Attorneys for Defendants-Appellants and Appellees.

Mr. Milton L. Farber, 5 E. Long St., Columbus 15, Ohio; Mr. Stanley U. Robinson, Jr., 5 E. Long St., Columbus 15, Ohio; Mr. Arthur Garfield Hays, New York, N. Y.; Mr. Osmond K. Fraenkel, New York, N. Y.; Mr. John D. Connor, 8 E. Broad St., Columbus 15, Ohio; Mr. Robert N. Gorman, 808 Traction Bldg., Cincinnati, Ohio, Attorneys for American Civil Liberties Union, Amicus Curiae.

Mr. Edmund B. Paxton, Asst. Pros. Atty., Court House, Cols., O.; Mr. David Clayman, 79 E. State St., Columbus 15, Ohio, Attorney for the Columbus Council for Democracy, Amicus Curiae.

Messrs. Pretzman & Dillon, 50 West Broad St., Columbus 15, Ohio, Attorneys for the Eastwood Civic Association, and three other like organizations, amicus curiae.

Filed Court of Appeals. Nov. 21, 1946. J. Arthur Yoder, Clerk.

Filed Supreme Court of Ohio. Jan. 6, 1947. Seba H. Miller, Clerk.

[fol. 29] IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

[Title omitted]

NOTICE OF APPEAL—Filed June 1, 1946

Comes now the above named defendants, appellants herein and hereby gives notice of appeal to the Court of Appeals from a judgment rendered by the Court of Common Pleas in the above entitled cause of action on the 17th day of April, 1946, and from the order overruling appellants' motion for a new trial rendered by said Court of Common Pleas on the 20th day of May, 1946.

This appeal is on questions of law & fact.

(Signed) Frank C. Shearer, Attorney for Appellants.

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Acknowledgment of Notice of Appeal

I, the undersigned, Attorney of record for appellees hereby acknowledge service and receipt of a copy of the foregoing notice of appeal this 1st day of June, 1946.

(Signed) Baxter Evans, Attorney for Appellees.

[File endorsement omitted.]

[fol. 30] In the Court of Common Pleas of Franklin County

Transcript of Docket and Journal Entries—To Court of Appeals Civil Case

Court of Common Pleas, Franklin County, Ohio

No. 169,126

Fred C. Perkins, Earl McCullough, Drell Murlette, G. P. Mohr, Mike Mercurio, Molley E. Vice, Plaintiffs,

vs.

Trustees of the Monroe Avenue Church of Christ, Individually and Collectively, Defendants

1945, Aug. 16. Petition filed.

1945, Aug. 16. Precipe filed. Summons issd. Shff. Frank Co. Ret. Aug. 27, 1945. Ans. Sep. 15, 1945.

1945, Aug. 16. Order with copy of Petition issd. Shff. Frank. Co. Ret. Aug. 27, 1945. 50¢.

1945, Sept. 5. Application of Fred Perkins and Earl McCullough, Pltffs, filed.

1945. Sept. 5. Precipe filed. Order with copy of Application issd. Shff. Frank. Co. Ret. Sept. 17, 1945. 50¢.

1945, Sept. 5. Precipe filed. Order with copy of Application issd. Shff. Frank. Co. Ret. Sep. 17, 1945. 50¢.

1945, Sept. 8. Temporary Mandatory Injunction allowed; Bond $500.00, as per Entry (20-152) 357-562 Re.

1945, Sept. 8. Precipe filed. Order with copy of Entry issd. Shff. Frank. Co. Ret. Sep. 17, 1945. 50¢.

1945, Sept. 8. Order with copy of entry issd. Shff. Frank. Co. Ret. Sep. 17, 1945. 50¢.

1945, Sept. 15. Motion to Quash Service and Shff's. return by Deft. filed.

1945, Sept. 15. Memo of Deft. filed.

1945, Sept. 19. Precipe filed. Summons issd. Shff. Frank. Co. Ret. Oct. 1, 1945. Ans. Oct. 20, 1945.

1945, Sept. 19. Order with copy of Petition, Motion and Entry issd. Shff. Frank. Co. Ret. Oct. 1, 1945. 50¢.

1945, Sept. 19. Summons issd. Shff. Frank. Co. Ret. Oct. 8, 1945. Ans. Oct. 27, 1945.

1945, Sept. 19. Order with copy of Petition, Motion and Entry issd. Shff. Frank. Co. Ret. Oct. 8, 1945. 50¢.

1945, Sept. 19. Motion of Pltffs. filed.

[fol. 31] 1945, Sept. 19. Monroe Avenue Church of Christ, etc., made party Deft. and process issue, as per Entry 358-83 Ki.

1945, Sept. 28, Amended Petition of Pltff. filed.

1945, Oct. 2. Notice of Deft. filed.

1945, Oct. 3. Official Shorthand & Stno by A. & O. filed. $4.00.

1945, Oct. 9. Official Shorthand Reporters Cert. filed $4.00.

1945, Oct. 11. Official Shorthand Reporters Certificate in Duplicate filed. $1.80.

1945, Oct. 13. Trial Brief of Deft. filed.

1945, Oct. 19. Brief of Pltffs. in favor of application for temporary injunction filed.

1945, Oct. 27. Trial Memo supplementing trial brief of the Deft. filed.

1945, Nov. 20. Temporary Mandatory Injunction be allowed; Bond continued, Exceptions noted, as Entry 359-60 Cl.

1945, Nov. 21. Official Shorthand Reporters Certificate in duplicate filed. $2.88.

1945, Nov. 26. Motion of Deft. for Order to dissolve and setting aside filed.

1945, Nov. 26. Motion to dismiss by Deft. filed.

1945, Nov. 26. Application of Defts. for permission to filed Motion, well taken, and permission granted, as per Entry. 359-66 Cl.

1945, Nov. 26. Hearing be held on Nov. 28, 1945, as Entry 359-65 Cl.

1945, Nov. 28. Official Shorthand & Steno By A. & O. filed. $4.00.

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1945, Dec. 4. Motions for Order dissolving and setting aside former order and to dismiss petition, Overruled. Exceptions noted, as per Entry 357-661 Cl.

1945, Dec. 8. Answer of Deft. filed.

1945, Dec. 22. Reply of Pltff. filed.

1945, Dec. 22. Sheriff's Returns filed.

1946, Jan. 23. Motion of Plaintiffs filed.

1946, Jan. 23. Order for Appearance in contempt proceedings, as per Entry 366-648 Cl.

1946, Jan. 23. Affidavit of Earl McCullough, Pltff. filed.

1946, Feb. 8. Lloyd L. Dickerson made party Deft; Process issue; Exceptions noted, as per Entry 367-11 Cl.

1946, Feb. 8. Motion of Plaintiffs filed.

1946, Feb. 8. Precipe filed. Summons on amended petition issd. Shff. Frank. Co. Ret. Feb. 18, 1946. Ans. Mar. 9, 1946.

[fol. 32] 1946, Feb. 8. Order with copy of Amended Petition, Motion and Entry issd. Shff. Frank. Co. Ret. Feb. 18, 1946. 50¢.

1946, Feb. 18. Temporary Mandatory Injunction allowed, Bond continued, as per Entry 367-36 Cl.

1946, Feb. 18. Application of Fred C. Perkins and Earl McCullough filed.

1946, Feb. 18. Affidavit of Fred C. Perkins and Earl McCullough filed.

1946, Feb. 18. Precipe filed. Order with copy of Entry issd. Shff. Frank. Co. Ret. Mar. 4, 1946. 50¢.

1946, Mar. 5. Official Shorthand Reporters Certificate filed. $4.00.

1946, Mar. 5. Motion of Defts. to dissolve & set aside filed.

1946, Mar. 5. Answer of the defendants filed.

1946, Mar. 6. Precipe filed. Order with copy of Entry issd. Shff. Frank. Co. Ret. Mar. 18, 1946. 50¢.

1946, Mar. 20. Precipe filed. Order with copy of Entry issd. Coroner. Frank. Co. Ret. Apr. 1, 1946. 50¢.

1946, Mar. 25. Motion of Defts. to dissolve and set aside former order, Overruled, Exceptions, as Entry 367-153 Cl.

1946. Mar. 25. Reply of Plaintiffs filed.

1946, Apr. 2. Motion of Defts. to suspend so much of Entry on Feb. 18, 1946, Sustained, Instructions to Sheriff, Exceptions of Pltff. noted, as per Entry. 367-166 Wi.

1946, Apr. 2. Official Shorthand Reporters Certificate filed. Taxed @ $8.00.

1946, Apr. 8. Brief of Pltffs. filed. (Mailed to Judge Wickham.)

1946, Apr. 20. Motion of the defendants for a New Trial filed.

1946, Apr. 20. Sheriff's Returns filed.

1946, May 20. Court finds covenant in deed seeking to restrain alienation void; Covenant against occupancy valid and Pltffs. entitled to permanent injunction; Findings; Pltffs. and Defts. excepts, as per Entry. 367-336 Wi.

1946, May 20. Motion of Defts. for New Trial filed.

1946, May 20. Motion of Pltff. for New Trial filed.

1946, May 20. Motion of Pltffs. to set aside Judgment and grant New Trial, Overruled, Pltffs. except, as per Entry. 367-337 Wi.

1946, May 20. Motion of Defts. for New Trial, Overruled, Defts. except, as per En-ry. 367-337 Wi.

[fol. 33] 1946, May 20. Adjudged and decreed that covenant seeking to restrain alienation, declared void and an unlawful restraint, Pltffs. except, Decreed that temporary mandatory injunction be made permanent, and covenant in deed against occupancy declared valid, and Deft. discontinue occupancy; Defts. except. Eviction authorized, appeal Bond $100.00; Stay shall not be operative unless supersedeas bond $500.00; Pltffs. recover from Defts. their costs, Defts. except, as Entry 367-338 Wi.

1946, May 20. Motion of Defts. for New Trial filed.

1946, May 20. Motion of Pltffs. for New Trial filed.

1946, May 20. Motion of Pltffs. to set aside Judgment and grant New Trial, Overruled; Pltffs. except, as per Entry. 367-339.

1946, May 20. Motion of Defts. for New Trial, Overruled; Defts. except, as per Entry. 367-339 Wi.

1946, June 1. Notice of Appeal to Court of Appeals filed.

1946, June 1. Acknowledgement of Notice of Appeal filed.

1946, June 6. Notice of Appeal by Appellants filed.

1946, June 6. Acknowledgement of Notice of Appeal filed.

1946, June 12. Preceipe filed. Transcript of Docket and Journal Entries issued to Court of Appeals.

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IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

Upon application of the plaintiffs herein for an injunction in this cause, it is ordered and decreed that until further order of this Court a temporary mandatory injunction be and the same is hereby allowed ordering the defendants to discontinue permitting a person or persons other than Caucasian from using and occupying the premises located at 93 North Ohio Avenue, Columbus, Ohio, upon the plaintiffs giving a bond according to law in the sum of $500.00.

(S.) Dana F. Reynolds, Judge.

Baxter Evans, Attorney for Plaintiffs.

[fol. 34] No. 169,126

(Caption omitted)

Filed September 19, 1945. Entry 358-83

This matter coming before the Court upon the motion of the plaintiffs to make the Monroe Avenue Church of Christ a party defendant herein, and it appearing to the Court that said motion is well taken, the Court orders that the Monroe Avenue Church of Christ, a corporation not for profit and located at 245 North Monroe Avenue, Columbus, Ohio, be, and it is hereby, made a party defendant herein, and it is also ordered that process issue for it.

John R. King, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs.

(Caption omitted)

Filed November 20, 1945. Entry 359-60

Upon application of the plaintiffs herein for a temporary mandatory injunction in this cause, it is ordered and decreed that until a further order of this Court a temporary mandatory injunction be allowed ordering and requiring the defendant, the Monroe Avenue Church of Christ, to discontinue immediately the present occupancy of the premises known as Lot Number Six (6), Hutcheson Heirs' Addition and located at Number 93 North Ohio Avenue, Columbus, Ohio, by Lloyd L. Dickinson (or Dickerson), or by any per-

son or persons other than of the Caucasian race, and that the bond in the sum of $500.00 heretofore ordered by the Court and posted on or about September 8, 1945, be continued for the purpose of this order.

Exceptions noted.

Joseph M. Clifford, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs; Frank C. Shearer, Attorney for Defendants.

[fol. 35] (Caption omitted)

Filed November 26, 1945. Entry 359-66

This cause coming on to be heard on the application of the defendants for permission to file a motion *ot* dismiss the petition of the plaintiffs herein out of time and the court being fully advised in the premises finds that said application is well taken, and permission is hereby granted for the defendants to file a pleading forthwith.

Joseph M. Clifford, Judge.

(Caption omitted)

Filed November 26, 1945. Entry 359-65

On application of the defendants, and for good cause shown, an oral hearing is hereby granted on the motion of the defendants for an order dissolving and setting aside the former order of this Court heretobefore made in this cause on 20th November, 1945.

Said oral hearing shall be held before this Court on the 28th day of November, 1945, at 9:30 o'clock A. M.

Joseph M. Clifford, Judge.

(Caption omitted)

Filed December 4, 1945. Entry 357-661

This cause coming on to be heard on the motion of the defendant, The Monroe Avenue Church of Christ, for an order dissolving and setting aside a former order of this

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Court, wherein a temporary mandatory injunction was allowed, and also coming on to be heard upon the motion of the defendant, The Monroe Avenue Church of Christ, to dismiss the petition of the plaintiffs, were argued by counsel and submitted to the Court. Upon due consideration thereof, the Court finds that both motions are not well taken and should be overruled.

It is, therefore, ordered, adjudged and decreed that both motions, as hereinabove referred to, be and the same are hereby overruled.

Exceptions noted.

Joseph M. Clifford, Judge.

Approved: Baxter Evans, Atty. for Pltffs. Frank C. Shearer, Atty. for Defts.

[fol. 36] (Caption omitted)

Filed January 23, 1946. Entry 366-648

On motion of plaintiffs and for good cause shown, it is ordered that the defendant, Monroe Avenue Church of Christ, through its representatives, be and appear before the Honorable Joseph M. Clifford, a Judge of the Court of Common Pleas, Franklin County, Ohio, at Room No. Five (5), Courthouse, Columbus, Ohio, on the 29th day of January, 1946, at 9:30 o'clock A. M., to show cause, if any it has, why it should not be punished for contempt of court and disobedience to the former order of the Court made herein on or about November 20, 1945.

It is further ordered that counsel for said defendant be notified in writing, by registered mail, of the time and place of said hearing, and that a copy of the Motion and Entry and Affidavit be enclosed therein.

Joseph M. Clifford, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs.

(Caption omitted)

Filed February 8, 1946. Entry 367-11

This matter coming before the Court upon the motion of plaintiffs to make Lloyd L. Dickerson a party-defendant herein, and it appearing to the Court that said motion is well taken, the Court orders that Lloyd L. Dickerson, No. 93 North Ohio Avenue, Columbus, Ohio, be, and he is hereby made a party-defendant herein, and it is also ordered that process issue for him.

Exceptions of Defendants noted.

Joseph M. Clifford, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs.

(Caption omitted)

Filed February 18, 1946. Entry 367-36

Upon application of the plaintiffs herein for a temporary mandatory injunction against Lloy- L. Dickerson, one of the defendants herein, and for good cause shown, it is [fol. 37] Ordered and Decreed that until further order of this Court, a temporary, mandatory injunction be and the same is hereby allowed, requiring the said Lloyd L. Dickerson to move from, and to vacate, the premises known as Lot No. Six, Hutcheson's Heirs' Addition, consisting of a lot and buildings thereon, and located at No. 93 North Ohio Avenue, Columbus, Ohio, by not later than the 5th day of March, 1946, and it is further Ordered that if he has not complied with this mandate allowing the said temporary mandatory injunction by the day above set forth, the Sheriff of Franklin County, Ohio, is hereby commanded, pursuant to process duly issued, to cause the defendant, Lloyd L. Dickerson, to be forthwith removed and evicted from said premises and to make due return thereon.

It is Further Ordered that the bond in the sum of Five Hundred Dollars ($500.00) heretofore given by the plaintiffs in this case, in accordance with the order of the Court made on or about September 8, 1945, be continued for the purpose of this order.

Exceptions noted.

Joseph M. Clifford, Judge.

Approved: Baxter Evans. Attorney for Plaintiffs.

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(Caption omitted)

Filed March 25, 1946. Entry 367-153

This cause coming on to be heard upon the motion of the defendants in the above entitled cause to dissolve and set aside the former order of this court made on February 18, 1946, allowing a temporary mandatory injunction against Lloyd L. Dickerson, was argued by counsel and submitted to the Court. Upon consideration thereof, the Court finds that said motion is not well taken and should be overruled.

It is therefore ordered, adjudged and decreed that said motion be, and the same is hereby, overruled.

Joseph M. Clifford, Judge.

Exceptions noted.

Approved: Baxter Evans, Attorney for Plaintiffs.

3/12/46—Returned by Mr. Shearer without signature.

[fol. 38] (Caption omitted)

Filed April 2, 1946. Entry 367-166

This cause coming on to be heard on the motion of the defendants to suspend the operation of so much of the entry entered in this cause on the 18th day of February 1946, which reads as follows: "And it is further ordered that if he has not complied with this mandate allowing the said temporary mandatory injunction by the day above set forth, the Sheriff of Franklin County, Ohio, is hereby commanded, pursuant to process duly issued, to cause the defendant, Lloyd L. Dickerson, to be forthwith removed, and evicted from said premises and make due return thereon," until such time as final entry has been filed in this cause on its merits.

The court being fully advised in the premises finds that said motion is well taken and that the same should be and it is hereby sustained, and the Sheriff of Franklin County is hereby ordered to refrain from carrying out the mandate

of this order heretofore referred to until further order of the Court.

Exceptions of Plaintiffs noted.

Fred R. Wickham, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs; Frank C. Shearer, Attorney for Defendants.

(Caption omitted)

Filed May 20, 1946. Entry 367-336

This cause coming on to be heard on the pleadings and the evidence and the same was argued by counsel and submitted to the Court. Upon consideration whereof the Court finds upon the issue joined that:

1. The covenant in the deed to the premises in question seeking to restrain the alienation of said premises to any person or persons other than of the Caucasian race is void and an unlawful restraint on alienation and the plaintiffs herein are not entitled to the relief prayed for in that respect; and:

2. The covenant contained in said deed against the occupancy of the premises in question by persons other than that of the Caucasian race is valid and the plaintiffs are entitled to a permanent injunction to restrain the defendant, The Monroe Avenue Church of Christ, from permitting Lloyd L. Dickerson or any other person or persons other than of the Caucasian race from occupying the same until January 1, 1960.

[fol. 39] The Court further finds that the defendant, The Monroe Avenue Church of Christ is an Ohio corporation not for profit and that the Monroe Avenue Church of Christ has a congregation largely made up on colored people and Lloyd L. Dickerson is part Negro.

The Court further finds that there is no evidence before the Court that the restriction against occupation by other than Caucasian is not any longer of value to the plaintiffs.

To all of which both plaintiffs and defendants except and said exceptions are noted.

Fred R. Wickham, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs; Frank C. Shearer, Attorney for Defendants.

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(Caption omitted)

Filed May 20, 1946. Entry 367-337

This cause coming on to be heard upon the motion of plaintiffs to set aside the judgment and decree rendered and to grant a new trial, was submitted to the Court. Upon consideration thereof, the court finds that said motion is not well taken.

It is therefore ordered and considered that said motion be and the same is hereby overruled.

To which finding and ruling of the Court, the plaintiffs except.

Fred R. Wickham, Judge.

Baxter Evans, Attorney for Plaintiffs. Frank C. Shearer, Attorney for Defendants.

(Caption omitted

Filed May 20, 1946. Entry 367-337

This cause came on for hearing on the — day of May, [fol. 40] 1946, on the motion of the defendants for a new trial. The Court on consideration thereof overruled said motion to which ruling the defendants except.

It is therefore considered by the Court after ruling the defendants' motion to set aside the findings and for a new trial that the plaintiffs are entitled to a permanent injunction to restrain the defendant, The Monroe Avenue Church of Christ, from permitting Lloyd L. Dickerson or any other person or persons other than of the Caucasian race from occupying same until January 1, 1960.

To all of which the defendants except.

Fred R. Wickham, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs; Frank C. Shearer, Attorney for Defendants.

(Caption omitted)

Filed May 20, 1946. Entry 367-338

JUDGMENT

The Courts having heretofore found that the covenant in the deed to the premises in question is an unlawful restraint on alienation, it is ordered, adjudged and decreed that the said covenant in the deed to the premises in question seeking to restrain the alienation of said premises to any person or persons other than persons of the Caucasian race, be and the same is hereby declared to be void and an unlawful restraint on alienation, and that the plaintiffs are not entitled to the relief prayed for in that respect.

To which order and decree of the Court, the plaintiffs except and their exceptions are hereby noted.

The Court having heretofore found that the covenant contained in the said deed against occupancy of the premises in question is valid, it is ordered, adjudged and decreed that the temporary mandatory injunction heretofore allowed by the Court against the defendant, The Monroe Avenue Church of Christ, on or about November 20, 1945, be and the same is hereby made permanent; that the said [fol. 41] covenant contained in the deed against occupancy of the premises in question by any person, or persons, other than of the Caucasian race be, and the same is hereby declared to be valid and that the defendant, The Monroe Avenue Church of Christ, discontinue immediately the occupancy of the said premises by any person or persons other than of the Caucasian race. It is further ordered, adjudged and decreed that the said defendant, The Monroe Avenue Church of Christ, be and it is hereby permanently enjoined from permitting any person or persons other than of the Caucasian race to occupy the said premises, except as a servant of the occupant of said premises, until January 1, 1960.

To which order and decree of the Court the defendants hereby except and their exceptions are hereby noted.

It is further ordered, adjudged and decreed that in the event any person or persons other than of the Caucasian race is, or are, occupying the said premises located at No. 93 North Ohio Avenue, Columbus, Ohio on the 1st day of June, 1946, and thereafter, except as a servant of the occupant of said premises, the Sheriff of Franklin County, Ohio, is

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hereby authorized and commanded to cause such person or persons to be forthwith removed and evicted from said premises and to make due return thereon.

To which order and decree of the Court, the defendants except and their exceptions are hereby noted.

In the event that a notice of appeal is filed in this cause on question of law and fact, the appellant or appellants filing such notice shall also file an appeal bond in the sum of $100.00. In the event such appeal is filed, a stay of execution herein shall not be operative unless and until a super sedeas bond be executed and filed by appellant or appellants, payable to the adverse parties with sufficient surety in the sum of $500.00, and it is so ordered. It is further ordered that the sufficiency of said sureties shall be aproved by a Judge of the Trial Court.

It is further ordered that the plaintiffs recover from the defendants their costs herein expended, to which order the defendants except.

Fred R. Wickham, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs; Frank C. Shearer, Attorney for Defendants.

[fol. 42] (Caption omitted

Filed May 20, 1946. Entry 367-339

This cause coming on to be heard upon the motion of plaintiffs to set aside the judgment and decree rendered and to grant a new trial, was submitted to the court. Upon consideration thereof, the court finds that said motion is not well taken.

It is therefore ordered and considered that said motion be and the same is hereby overruled.

To which findings and rulings of the court, the plaintiffs except.

Fred R. Wickham, Judge.

Baxter Evans, Attorney for Plaintiffs. Frank C. Shearer, for Defendants.

(Caption omitted

Filed May 20, 1946. Entry 367-339

This cause came on for hearing on the — day of May, 1946, on the motion of the defendants for a new trial. The Court on consideration thereof overruled said motion to which ruling the defendants except.

It is therefore, considered by the Court after ruling the defendants' motion to set aside the findings and for a new trial that the plaintiffs are entitled to a permanent injunction to restrain the defendant, The Monroe Avenue Church of Christ, from permitting Lloyd L. Dickerson or any other person or persons other than of the Caucasian race from occupying same until January 1, 1960.

To all of which the defendants except.

Fred R. Wickham, Judge.

Approved: Baxter Evans, Attorney for Plaintiffs; Frank C. Shearer, Attorney for Defendants.

(Caption omitted)

No. 169,126

Decision

Heard on the application of plaintiffs for a temporary [fols. 43-148] mandatory injunction.

Sustained and Allowed—upon the evidence adduced and the law clearly and adequately set forth and argued in the brief of plaintiffs filed herein.

Wherefore, a temporary mandatory injunction is allowed by the Court, to issue forthwith upon the plaintiffs giving bond according to law in the sum of $500.00.

Joseph M. Clifford, Judge.

November 10, 1945.

Filed Supreme Court of Ohio, January 6, 1947. Seba H. Miller, Clerk.

Clerk's Certificate to foregoing paper omitted in printing.

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[fol. 149] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY

[Title omitted]

DEFENDANTS' MOTION FOR NEW TRIAL—Filed May 20, 1946

Now comes the defendants and moves the Court to vacate and set aside the verdict herein and for a new trial for the following causes which materially affect the substantial rights of these defendants, to wit:

1. For irregularity in the proceedings of the Court and abuse of discretion by which the defendants were prevented from having a fair trial;

2. That the final order of the Court is not sustained by sufficient evidence and is contrary to law;

3. And for errors of law occurring at the trial and excepted to by the defendants at the time.

And for other errors manifest from the face of the record.
Frank C. Shearer, Attorney for the Defendants.

[File endorsement omitted.]

[fol. 150] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Title omitted]

PLAINTIFFS' MOTION FOR NEW TRIAL—Filed May 20, 1946

Now comes the plaintiffs and move the court to vacate and set aside the judgment and decree rendered herein and to grant a new trial for the following causes which affect the substantial rights of the plaintiffs:

1. That the final order, judgment and decree of the court is contrary to law.

2. Errors of law occurring at the trial and excepted to by the plaintiffs at the time.

(Signed) Baxter Evans, Attorney for Plaintiffs, Law Department, City Hall, Columbus 15, Ohio.

[File endorsement omitted.]

[fol. 151] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

FRED C. PERKINS et al., Plaintiffs,

vs.

THE TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST et al., Defendants

OPINION—Filed April 17, 1946

WICKHAM, J.:

In the year 1926 all of the owners of some twenty-nine lots on Ohio Street in the City of Columbus, Ohio, and being all of the lots on Ohio Street between the first alley north of Broad and the first alley south of Long, consulted together in order to determine a plan by which to limit the ownership and occupancy of the properties in said area to white persons.

Following a mutually agreed upon plan each of said property owners conveyed his property to the Guarantee Title & Trust Company of Columbus, Ohio, which thereupon reconveyed the lots to the respective former owners by quit claim deeds, each deed containing the following covenants:

> "Said Grantee, as a part of the consideration for this conveyance, and for the mutual benefit of all of the owners of the lots on the east and west sides of North Ohio Avenue, between the first alley north of East Broad Street and the first alley south of East Long Street, and of every other present and subsequent owner of a lot or lots in the territory above described for himself and his heirs, hereby covenants and agrees with the said Grantor herein, its successors and assigns, that at no time prior to January 1, 1960, shall any lot or part of a lot, or interest in any of the premises located on Ohio Avenue, as aforesaid, be leased, rented, sold or conveyed to any person or persons of any race other than Caucasian, nor shall any such person or persons other than Caucasian be permitted to occupy the same during that period, except as a servant of the occupant of any of said premises.
>
> [fol. 152] "And it is expressly agreed that if said Grantee, his heirs, executors, administrators or assigns,

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or any one holding or claiming by, through or under any of them, shall violate this condition, then these presents and this conveyance shall become null and void, and all the right, title, interest and estate in said premises shall immediately revert to and be revested in the Grantor hereof, its successors and assigns, and it shall be seized as of its former estate herein as if these presents had never been executed, and may immediately re-enter, re-possess and hold said premises as of a good estate in fee simple, and the Grantor hereof hereby gives and grants to the present owners of any or all of the other lots in the location fronting on Ohio Avenue in the territory above described, their heirs, executors, administrators and assigns, on a violation of the condition or restriction aforesaid, the right by proper legal proceedings to enforce the above condition, restriction and reversion. And the Grantee hereof, by accepting this deed, agrees to and with any or all of the owners of the other lots or parcels fronting on Ohio Avenue in the territory above described, their heirs, executors, administrators and assigns, that they or any one or more of them may enforce by proper legal proceedings the aforesaid condition, restrictions and reversion; and the above condition and restriction shall until January 1, 1960, be considered as running with the said real estate hereby conveyed and shall be made a part of all deeds and conveyances, instruments, leases, transfers, assignments and agreements made by the said Grantee, his heirs, executors, administrators or assigns, or any of them of said premises.

"This deed has been executed pursuant to a general plan for the establishment of a highly restricted neighborhood and for the improvement and betterment of all the lots hereinabove described and the covenants in this deed are entered into as a part of a general plan for the benefit of each lot owner, therefor the grantor and grantee herein covenant, with all deeds, conveyances and contracts of sale for said lots shall recite the conditions and restrictions herein contained."

These deeds were duly recorded in the Records of Deeds of Franklin County, Ohio.

Since 1926 the growth of a large negro section in Columbus has brought the ownership and occupancy of residential

properties by colored people to the borders of the Ohio Street lots here in question on the north and on the west, and the occupants of these two sections are practically exclusively negro, whereas the properties contiguous on the south and on the east have not changed in character from exclusively, or practically exclusively, Caucasion.

[fol. 153] On and before June 29, 1945, Lot No. 6 in Hutchisson Heirs Addition, being a single residence property at 93 North Ohio Avenue, was owned by one Amelia Cipriano, and on June 29, 1945, she conveyed it to Constance Conners, who on the same day conveyed it to the East End Realty Co., who in turn conveyed it on the same day to The Monroe Avenue Church of Christ, and Ohio corporation not for profit, the latter using the premises as a parsonage for Lloyd L. Dickerson, its minister, and the present occupant of the residence. The Monroe Avenue Church of Christ has a congregation largely made up of colored people, and Rev. Lloyd L. Dickerson is part negro.

Rev. Dickerson took part in the negotiations for the acquisition of the property, and had been informed that there were restrictions against non-Caucasians in the prior deeds to the property in question.

The plaintiff seeks a decree of injunction to restrain the Monroe Avenue Church of Christ from selling or conveying the premises in question to any person or persons other than Caucasian, and to discontinue permitting Lloyd L. Dickerson or any other person other than Caucasian to occupy said premises.

The defendants contend that the restrictive covenants are void and unenforcible because they are unconstitutional, contrary to public policy, illegal, and because, if ever valid, their validity has been nullified by a material change in the character of the neighborhood since 1926.

It is to be noted that the covenants in question seek to prevent:

1. Alienation of the property to persons other than of the Caucasian race.

2. Occupancy of the premises by persons other than Caucasian.

As to the first point, it seems that the Supreme Court of Ohio has never spoken in regard to the validity of cove-

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nants of this particular character, and in other jurisdictions [fol. 154] the courts are divided as to the validity of covenants limiting alienation of real estate to members of a certain race. See Annotations in 9 A. L. R. 115, 66 A. L. R. 518, 114 A. L. R. 1237. See also COVENANTS, CONDITIONS AND RESTRICTIONS 14 Am. Jur. 618. The jurisdictions holding that such restrictions are invalid do so on the basis that the restriction is repugnant to the fee simple estate created, and that public policy forbids any general restraint on alienation rather than on the basis that racially discriminatory covenants are contrary to public policy.

In Anderson v. Cary, 36 O. S. 506, it was held that a testator's fee simple devise to his sons could not be conditioned that they should not sell the property until ten years after one son should become of full age, holding the condition void as repugnant to the devise and contrary to public policy. In the opinion it is stated, (page 515)

> "By the policy of our laws, it is of the very essence of an estate in fee simple absolute, that the owner, who is not under any personal disability imposed by law, may alienate it or subject it to the payment of his debts at any and all times; and any attempt to evade or eliminate this element, from a fee simple estate, either by deed or by will, must be declared void and of no force. Hobbs v. Smith, 15 O. S. 419."

In Williams v. Commercial Land Company, 10 Abstract 314, the Court of Appeals of this county held void a covenant against conveyance to colored persons which contained no time limit, and this was followed by the same court in Bulen v. Rice, 11 Abstract 175, in holding void a similar covenant against conveyance to persons of African blood, unlimited as to time.

Some courts make a distinction between covenants unlimited as to time, and those subject to a "reasonable" time limit, but the courts that hold that any limit is too much, tend to follow the leading case of Mandlebaum v. McDonnell, 29 Mich. 78, 18 Am. Rep. 61, where Mr. Justice Christiancy held that a restraint on alienation for any length of time was invalid. The language above quoted from Anderson v. Cary, Supra, would seem to suggest that when the time comes Ohio will be found in Michigan's camp holding that restraints on alienation based upon race are void.

[fol. 155] But if the covenant against alienation to non-Caucasians *if* void, does it follow that the covenants against use and occupancy by non-Caucasians is invalid?

> "In the consideration of whether restrictive covenants or conditions discriminating against persons on account of race, color, or religion violate the rule forbidding restraints upon alienation, a distinction must be drawn between a covenant or condition which binds the grantee not to transfer or convey the property to certain classes of individuals, and one which binds him not to permit the property to be occupied by them. All courts agree that a condition or covenant that property shall not be occupied by persons of certain races is not invalid as a restraint upon the alienation of the property."
>
> 14 Amer. Jur. 618

Thus in Schulte v. Starks, 238 Mich. 102, 213 N. W. 102, it was held that while a restraint upon alienation of lots of a subdivision to a colored person is void, a restraint upon occupancy of lots in such subdivision by colored persons is valid and enforcible, and this distinction *if* further exemplified or noted in Meade v. Dennistone, — Md. —, 196 A. 330, 114 A. L. R. 1227; also Los Angeles Investment Co. v. Gary, 181 Cal. 680, 176 P. 596, 9 A. L. R. 115; Wayt v. Patee, — Cal. —, 269 P. 660; White v. White, — Va. —, 150 S. E. 531, 66 A. L. R. 518; Parmalee v. Morris, 218 Mich. 695, 188 N. S. 330, 38 A. L. R. 1180. See also Price v. Dryer, 19 Abst. 695. (Franklin County, Ohio, Court of Appeals.)

Covenants restricting the use to which real estate may be put have been sanctioned in Ohio. Brown v. Huber, 80 O. S. 183 (restricting building that may be erected on premises to a residence costing not less than $5000.00). Wallace v. Clifton Land Company, 92 O. S. 349 (restricting use of premises to residential purposes and against sale of intoxicating liquor, building within 10 feet of lot lines or 40 feet of the street, building at a cost of less than $5,000.00), Dixon v. Van Sweringen Co., 121 O. S. 56, Roby v. The Plain City Theater Co., 126 O. S. 473 (restriction against using the premises as a theater or for public gatherings of any kind), Deeds, 13 O. Jur. 971, et seq.

[fol. 156] The contention that restrictions such as are involved in the case at bar are invalid and illegal as viola-

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tions of the provisions of the federal and state constitutions has long been settled in the negative. Corrigan v. Buckley, 271 U. S. 323, 70 L. Ed. 969; Meade v. Dennistone, supra, Annotations 114 A. L. R. 1239; Burkhardt v. Lofton, California District Court of Appeals, 1944, 146 Pacific 2d 720.

In the last mentioned case the claim that the enforcement of such a covenant by the state's judicial officers would be state action was answered as follows:

> "No question as to the right of citizens to contract with each other with relation to their own property was involved in any of the cited cases, and that right should not be confused with the power of legislation which is possessed by municipal and state governments. The decree of the trial court in the instant case, was not, within constitutional principles, action by the state through its judicial department. Plaintiff's rights are derived from their contract, the subject matter of which belonged exclusively to the contracting parties. The decree appealed from created no rights in plaintiffs; it only declared what they were and provided for their enforcement. If the contract is valid it cannot be nullified under any theory that courts are without the power to enforce it."

The same decisions also giv- the answer to the argument that racial restrictions are against public policy:

> "Defendants further argue that racial restrictions are against 'the present public policy of the nation and of this state.' They quote section 51 of the Civil Code as supporting this argument. This section guarantees to all citizens equal accommodations of inns and certain other public establishments, subject to conditions applicable alike to all citizens. This, of course, establishes the policy of the state as far as it goes but no further than that. Limitations upon the use of real property such as the one under consideration have never been declared to be against public policy by legislative authority, so far as we are advised, and they have been uniformly upheld by the courts. Racial restrictions have been employed in the development of countless residential communities and have very generally been considered essential to the maintenance and stability of property values. Non-Caucasians are

and always have been just as free to restrict the use and occupancy of their property to members of their own races as Caucasians have been. The fact that the members of the Caucasian race have freely availed [fol. 157] themselves of this right throughout the nation, even though those of the non-Caucasian races have not, is the most satisfactory proof of the public policy of the nation with respect to this phase of the right to contract. No doubt public policy changes and develops with the times, but these changes must have their sources in the citizenry and not in the decisions of courts or the pronouncements of publicists and politicians. The right to contract with reference to their own property is one that is preserved to all citizens and, except where restricted by law, is a right which the peoples of all races may exercise freely. It cannot be denied by the courts to those who make use of it in certain situations because others similarly situated may choose not to avail themselves of it. The responsibility of striking down the validity of racial restrictions with respect to the use and occupancy of real property is one which no court or judge should assume on the strength of individual theories as to what constitutes the 'present' public policy on the subject or of personal belief that the consequences would be for the general good. The desirability of a more understanding and harmonious relationship among the many races of our nation is something no one will deny, but it will come only with time and experience and it is a matter in which public thought and conscience cannot be directed or controlled by the courts through the uprooting of firmly established precedent."

The fact that since the imposition of the restrictions there has been a change in character of the surrounding neighborhood on two of its four sides does not in itself invalidate the restrictions. Meade v. Dennistone, Supra; Grady v. Garland, 67 App. D. C. 73, 89 F. 2d 817. In the latter case the court stated that the object of the restriction was to prevent the invasion of the restricted property by colored people, not the invasion of property surrounding it.

In Brown v. Huber, Supra, the second paragraph of the syllabus states:

> "Where such covenant or restriction is still of substantial value to the dominant lot, notwithstanding the changed condition of the neighborhood in which said lot is situated, a court of equity will restrain its violation."

There is no evidence before the court that the restriction against occupation by other than Caucasions is not any longer of value to the plaintiffs.

Finally, the defendants say that the restrictive covenant [fol. 158] here in question is unenforcible on account of vagueness and uncertainty because in a technical sense the word Caucasion has no really exact meaning, and it is even argued that negro-s are Caucasians in one sense of the word. But it is very well settled that words in a written contract are to be interpreted according to their common, ordinary, and usual meaning. Cincinnati S. & C. R. Co. v. Indiana B. & W. R. Co., 44 O. St. 287. It is perfectly obvious that the intention of the parties to the deeds that were executed in 1926 was to limit occupancy of the area in question to what are usually known as white persons, and to exclude what are usually known as colored persons, and it is also perfectly obvious that the Rev. Dickerson and his family are the kind of persons usually known as colored persons, hence his occupancy of the premises in question is clearly a violation of the covenant against occupancy by non-Caucasians.

Other points argued by the defendants are outside of the issues made by the pleadings.

It is therefore the conclusion of the court that the covenant seeking to restrain alienation of the premises in question to any other than persons of the Caucasian race is void and an unlawful restraint on alienation, and that the plaintiff is not entitled to the relief prayed for in that respect.

It is further the conclusion of the court that the covenant against occupancy of the premises by persons other than of the Caucasian race is valid, and that the plaintiffs are entitled to a permanent injunction to restrain the defendant, The Monroe Avenue Church of Christ, from permitting Lloyd L. Dickerson, or any other person or per-

sons other than of the Caucasian race, from occupying the same until January 1, 1960.

[File endorsement omitted.]

[fol. 159] In the Common Pleas Court of Franklin County, Ohio

[Title omitted]

Reply to Answer—Filed March 25, 1946

Now come Fred C. Perkins et al., plaintiffs herein, and for their Reply to the Answer of the defendants, filed on or about March 5, 1946, deny each and every allegation and averment contained in the second, third, fourth, fifth, sixth, seventh and eighth defenses of said Answer.

Wherefore, said plaintiffs renew their prayer as set forth in the amended petition filed in the above entitled cause.

(Signed) Baxter Evans, Attorney for Plaintiffs.

Duly sworn to by Earl McCullough. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 160] In the Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Motion to Dissolve and Set Aside Temporary Injunction—Filed March 5, 1946

Comes now the defendants in the above styled cause of action and moves the Court for an order dissolving and setting aside the former order of this Court heretobefore made on the 18th day of February, 1946, which was a temporary mandatory injunction ordering Lloyd L. Dickinson to move from and vacate the premises known as 93 North Ohio Avenue, Columbus, Ohio, by not later than the 5th day of March, 1946, and ordering the Sheriff of Franklin County, Ohio, pursuant to process duly issued, to cause the

defendant, L. L. Dickinson to be moved and evicted from said premises. Said motion being for the reason that the order is invalid as being improperly applied and not well grounded in law or equity.

Frank C. Shearer, Attorney for the Defendants.

[File endorsement omitted.]

[fol. 161] In the Court of Common Pleas, Franklin County, Ohio

[Title omitted]

Answer to Second Amended Petition—Filed March 5, 1946

Now comes the defendants and for their answer to the plaintiffs' second amended petition admit that the Monroe Avenue Church of Christ is a religious society incorporated as a corporation not for profit under the laws of the State of Ohio. Further answering, the defendants deny each and every other allegation contained in the plaintiffs' second amended petition and not herein specifically admitted.

Second Defense

Further answering and for their second defense, the defendants say that since the date of the agreement alleged in the plaintiffs' second amended petition, the conditions and character of the neighborhood have materially changed in that the neighborhood now is surrounded by and inhabited by persons known as Negroes or Colored persons and said persons are of a complexion different from those in the neighborhood at the time of the alleged agreement.

Third Defense

Defendants say that the enforcement of race restrictions and covenants violate the provisions of the 14th Amendment of the Constitution of the United States and the national public policy in that such enforcement would violate the provision that "no State shall . . . enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty or property, without dues process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 162] Fourth Defense

Defendants further answering say that the corporation, defendants herein, has no racial identity because the corporation is an entity separate and apart from the members thereof.

Fifth Defense

Defendants say that race restrictive covenants are restraints on alienation and are repugnant to the estate granted where they, as here, would interfere with the free alienation of property or the estate thereon.

Sixth Defense

Defendants further answering say that the enforcement of such race restrictive covenants would violate the provisions of Section 1 of the Bill of Rights of the Constitution of Ohio because it would interfere with the right to acquire, possess and protect property and to seek and obtain happiness and safety, contrary to the provisions of said Section 1.

Seventh Defense

Defendants say that the race restrictive covenant alleged in the plaintiffs' petition is unenforcible on account of vagueness and uncertainty because the provisions thereof and the language thereof does not with definiteness and certainty identify who are "persons of any race other than Caucasian" and because such term is incapable of being clearly defined.

Eighth Defense

That the contract is void ab initio because of the illegality of the cause in the inducement.

Wherefore, the defendants pray that the second amended petition of the plaintiffs herein be denied and dismissed,

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and for such other and further relief as may be commensurate with their rights and interests.

(Signed) Frank C. Shearer, Attorney for the Defendants.

Duly sworn to by L. L. Dickinson. Jurat omitted in printing.

[fol. 163] [File endorsement omitted.]

[fol. 164] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Title omitted]

MOTION TO ADD A PARTY-DEFENDANT—February 8, 1946

Now come Fred C. Perkins et al., plaintiffs herein, by their attorney, and move the Court that Lloyd L. Dickerson, located at No. 93 North Ohio Avenue, Columbus, Ohio, be made a party-defendant herein for the following reason:

He is the Minister of the Monroe Avenue Church of Christ, one of the defendants herein, and is occupying the premises in question at No. 93 North Ohio Avenue, Columbus, Ohio.

(Signed) Fred C. Perkins, et al., by Baxter Evans, Their Attorney.

[File endorsement omitted.]

[fol. 165] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Title omitted]

REPLY TO ANSWER—Filed Dec. 22, 1945

Now come Fred C. Perkins et al., plaintiffs herein, and for their reply to the answer of the defendants, deny each and every allegation and averment contained in the Second, Third, Fourth, Fifth, Sixth and Seventh defenses of said answer.

Wherefore, said plaintiffs renew their prayer set forth in the amended petition filed in the above entitled cause.

(Signed) Baxter Evans, Attorney for Plaintiffs.

Duly sworn to by Earl McCullough. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 166] In the Court of Common Pleas Franklin County, Ohio

[Title omitted]

Answer to Amended Petition—Filed December 8, 1945

Now comes the defendants and for answer to the amended petition of the plaintiffs they admit the truth of the following:

That the Monroe Avenue Church of Christ is a religious society incorporated as a corporation not for profit under the laws of the State of Ohio, that the premises known as 93 North Ohio Avenue was, on June 29, 1945, transferred and conveyed to the Trustees of the Monroe Avenue Church of Christ, one of the defendants, and that the Monroe Avenue Church of Christ is the real party in interest herein and that it is actually the owner of said premises.

Further answering, the defendants for want of knowledge or information deny "that in the year 1926, the Guarantee Title and Trust Company, Columbus, Ohio, executed and delivered a separate deed to the owner of each lot located on the east and west side of North Ohio Avenue, between the first alley north of East Broad Street and the first alley south of East Long Street, Columbus, Ohio; that said deeds were recorded in the Deed Records in the office of the recorder of Franklin County Ohio; that in each deed the grantee, as part of the consideration for the conveyance and for the mutual benefit of all the owners of the lots in the territory described above, and of every other present and subsequent owner of a lot or lots therein covenanted and agreed with the grantor its successors and assigns that at no time prior to January 1, 1960, shall any lot or part of the lot, or interest in any of the premises located on

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Ohio Avenue, within the limits above referred to be leased, rented, sold or conveyed to any person or persons of any race other than Caucasian, nor shall any such person or [fol. 167] persons other than Caucasian be permitted to occupy the same during that period, except as a servant of the occupant of said premises; furthermore that the conditions and restrictions contained therein shall be considered as running with the real estate thereby conveyed and shall be made a part of all deeds and conveyances, instruments, leases, transfers, assignments and agreements made by the grantee, his heirs, executors, administrators or assigns."

And for want of knowledge the defendant- deny "that each deed recited herein that it had been executed pursuant to a general plan for the establishment of a highly restricted neighborhood and for the improvement and betterment of all the lots therein described and that the covenants herein are entered into as a part of the general plan for the benefit of each lot owner and that, therefore, the grantor and grantee therein covenanted that all deeds and contracts of sale for said lots shall recite the conditions and restrictions therein contained" • • • and, "that each is the owner of a lot or lots in said territory; that all of said plaintiffs are, with the exception of Molly E. Vice, residing thereon and that each of their lots is subject to all of the restrictions, covenants and agreements above set forth."

Defendants admit that Rev. L. L. Dickinson is the Minister of the Monroe Avenue Church of Christ, a corporation, and that said corporation has been in possession of the property known as 93 North Ohio Avenue since on or about August 28, 1945.

Defendants deny each and every allegation contained in the plaintiffs' petition and not herein specifically admitted.

Second Defense

Further answering and for their second defense, the defendants say that since the date of the agreement alleged in the plaintiffs' amended petition, the conditions and character of the neighborhood have materially changed in that the neighborhood now is surrounded by and inhabited by persons known as Negroes or Colored persons and said persons are of a complexion different from those in the neighborhood at the time of the alleged agreement.

[fol. 168] *Third Defense*

Defendants say that the enforcement of race restrictions and covenants violate the provisions of the 14th Amendment of the Constitution of the United States and the national public policy in that such enforcement would violate the provision that "no State shall . . . enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourth Defense

Defendants further answering say that the corporation, defendants herein, has no racial identity because the corporation is an entity separate and apart from the members thereof.

Fifth Defense

Defendants say that race restrictive covenants are restraints on alienation and are repugnant to the estate granted where they, as here, would interfere with the free alienation of property or the estate thereon.

Sixth Defense

Defendants further answering say that the enforcement of such race restrictive covenants would violate the provisions of Section 1 of the Bill of Rights of the Constitution of Ohio because it would interfere with the right to acquire, possess and protect property and to seek and obtain happiness and safety contrary to the provisions of said Section 1.

Seventh Defense

Defendants say that the race restrictive covenant alleged in the plaintiffs' petition is unenforcible on account of vagueness and uncertainty because the provisions thereof and the language thereof does not with definiteness and certainty identify who are "persons of any race other than Caucasian" and because such term is incapable of being clearly defined.

[fol. 169] Wherefore the defendants pray that upon a hearing of this cause in equity the amended petition of the

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plaintiffs be dismissed, and for such other and further equitable relief as may be commensurate with their rights and interest.

(Signed) Frank C. Shearer, Attorney for the Defendants.

Duly sworn to by Frank C. Shearer. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 170] IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

[Title omitted]

MOTION TO DISSOLVE INJUNCTION—Filed November 26, 1945

Comes now the defendant, the Monroe Avenue Church of Christ, a corporation, and moves the Court for an order dissolving and setting aside the former order of this Court heretofore made on the 20th day of November, 1945, which was a mandatory injunction (temporary) ordering a certain occupant to vacate the premises known and described as 93 N. Ohio Avenue, Columbus, said motion for the reason that the petition of the plaintiff's on which the temporary order was made does not state grounds for equitable relief and on the grounds that the character of the neighborhood has changed.

(Signed) Frank C. Shearer, Attorney for the defendants.

[File endorsement omitted.]

[fol. 171] IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

[Title omitted]

AMENDED PETITION—Filed September 28, 1945

Plaintiffs say that they bring this action against the Trustees of the Monroe Avenue Church of Christ, Columbus, Ohio, and also against the Monroe Avenue Church of Christ,

located at Number 245 North Monroe Avenue, Columbus, Ohio; that said Monroe Avenue Church of Christ is a religious society incorporated as a corporation not for profit under the laws of the State of Ohio; that by order of the Court rendered on or about Sept. 19, 1945, the said Monroe Avenue Church of Christ was duly made a party defendant herein.

Plaintiffs further say that the names and addresses of said trustees of the Monroe Avenue Church of Christ are unknown to the plaintiffs and cannot with reasonable diligence be ascertained by them.

Plaintiffs say that in the year 1926, the Guarantee Title & Trust Company, of Columbus, Ohio, executed and delivered a separate deed to the owner of each lot located on the east and west sides of North Ohio Avenue, between the first alley north of East Broad Street and the first alley south of East Long Street, Columbus, Ohio; that said deeds were recorded in the Deed Records in the office of the Recorder of Franklin County, Ohio; that in each deed the grantee, as a part of the consideration for the conveyance and for the mutual benefit of all the owners of the lots in the territory above described, and of every other present and subsequent owner of a lot, or lots therein, covenanted and agreed with the grantor, its successors and assigns, that at no time prior to January 1, 1960 shall any lot or part of a lot, or interest in any of the premises located on Ohio Avenue, within the limits above referred to, be leased, rented, sold or conveyed [fol. 172] to any person or persons of any race other than Caucasian, nor shall any such person or persons other than Caucasian be permitted to occupy the same during that period, except as a servant of the occupant of said premises; furthermore, that the conditions and restrictions contained therein shall be considered as running with the real estate thereby conveyed and shall be made a part of all deeds and conveyances, instruments, leases, transfers, assignments and agreements made by the grantee, his heirs, executors, administrators or assigns.

Plaintiffs further say that each deed recited therein that it had been executed pursuant to a general plan for the establishment of a highly restricted neighborhood and for the improvement and betterment of all the lots therein described and that the covenants therein are entered into as a part of a general plan for the benefit of each lot-owner and that, therefor, the grantor and grantee therein covenanted

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that all deeds and contracts of sale for said lots shall recite the conditions and restrictions therein contained.

Plaintiffs further say that each is the owner of a lot or lots in said territory; that all of said plaintiffs are, with the exception of Molly E. Vice, residing thereon and that each of their lots is subject to all of the restrictions, covenants and agreements above set forth.

Plaintiffs further say that one of the lots in said territory so restricted in the year 1926, as above set forth, is described as Lot Number Six (6), Hutcheson Heirs' Add.; that this lot is improved with a single residence and is located at No. 93 North Ohio Avenue; that by mesne conveyances said premises was conveyed to Amelia Cipriano in the year 1944; that on June 29, 1945 it was transferred and conveyed by deed to one Constance Connors, who in turn on the same day transferred and — it to the East End Realty Company; that immediately thereafter on the same day said East End Realty Company by Wilbur T. Bruce, Secretary, transferred and conveyed it to the Trustees of the Monroe Avenue Church of Christ, one of the defendants.

Plaintiffs further say that the deed to Constance Connors and the deed to the East End Realty Company both recited that the respective conveyance was made by the grantor therein and accepted by the grantee therein subject to any and all conditions and restrictions contained in former [fol. 173] deeds for the said premises; that the deed to said The Trustees of the Monroe Avenue Church of Christ made no reference whatsoever to, nor was there recited therein, the said conditions and restrictions.

Plaintiffs further say that the said deed to the Trustees of the Monroe Avenue Church of Christ contains no language, other than the use of the word "trustees," which shows, or tends to show, the existence of a trust with respect to said premises.

Plaintiffs further say that the said defendant, the Monroe Avenue Church of Christ is the real party in interest herein and that it is actually the owner of the said premises.

Plaintiffs further say that on or about August 28, 1945 the said defendants, the Monroe Avenue Church of Christ and the Trustees of the said church permitted one Lloyd L. Dickinson (or Dickerson) to occupy, and he did occupy, the said lot number Six (6), Hutcheson Heirs' Addition, together with the residence and other buildings located thereon, located at number 93 North Ohio Avenue; that he

is now occupying the same in violation of the deed restrictions, covenants and conditions, as set forth and referred to above; that the said Lloyd L. Dickinson (or Dickerson) is the minister of the said Monroe Avenue Church of Christ and that he is a person other than Caucasian.

Plaintiffs further say that the said Trustees of the Monroe Avenue Church of Christ are not persons of the Caucasian race.

Plaintiffs further say that they have no adequate remedy at law and are entitled to have said covenants, agreements and restrictions specifically enforced in equity by an injunction restraining the defendants from violating the same, and also by a mandatory injunction to prevent them from continuing the violation of the same.

Wherefore, the plaintiffs pray that, pending the final disposition of this case, the defendant, the Monroe Avenue Church of Christ, be required and ordered by the Court to discontinue immediately the present occupancy of the said premises by the said Lloyd L. Dickinson (or Dickerson) or by any person or persons other than Caucasian who may be occupying the said premises in violation of the deed restrictions and covenants and agreements, as set forth and re- [fol. 174] ferred to above, also to enjoin the said defendant, the Monroe Avenue Church of Christ, pending the final disposition of this case, from leasing, renting, selling or conveying to any person or persons of any race other than Caucasian or permitting any such person or persons other than Caucasian to occupy the same, and upon final hearing of this case for an order to make the temporary mandatory injunction permanent and to enjoin the defendant, the Monroe Avenue Church of Christ, from leasing, renting, selling or conveying to any person or persons of any race other than Caucasian, or permitting any such person or persons other than Caucasian to occupy the said premises for a period of thirty-four years from January 15, 1926; that the plaintiffs be granted further and other relief to which they may be entitled in equity and that the plaintiffs recover their costs herein expended.

(Signed) Baxter Evans, Attorney for Plaintiffs.

Duly sworn to by G. P. Mohr, and Drell Murlette. Jurats omitted in printing.

[File endorsement omitted.]

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[fol. 175] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 176] In the Supreme Court of the United States

Fred C. Perkins, et al., Plaintiffs-Appellees,

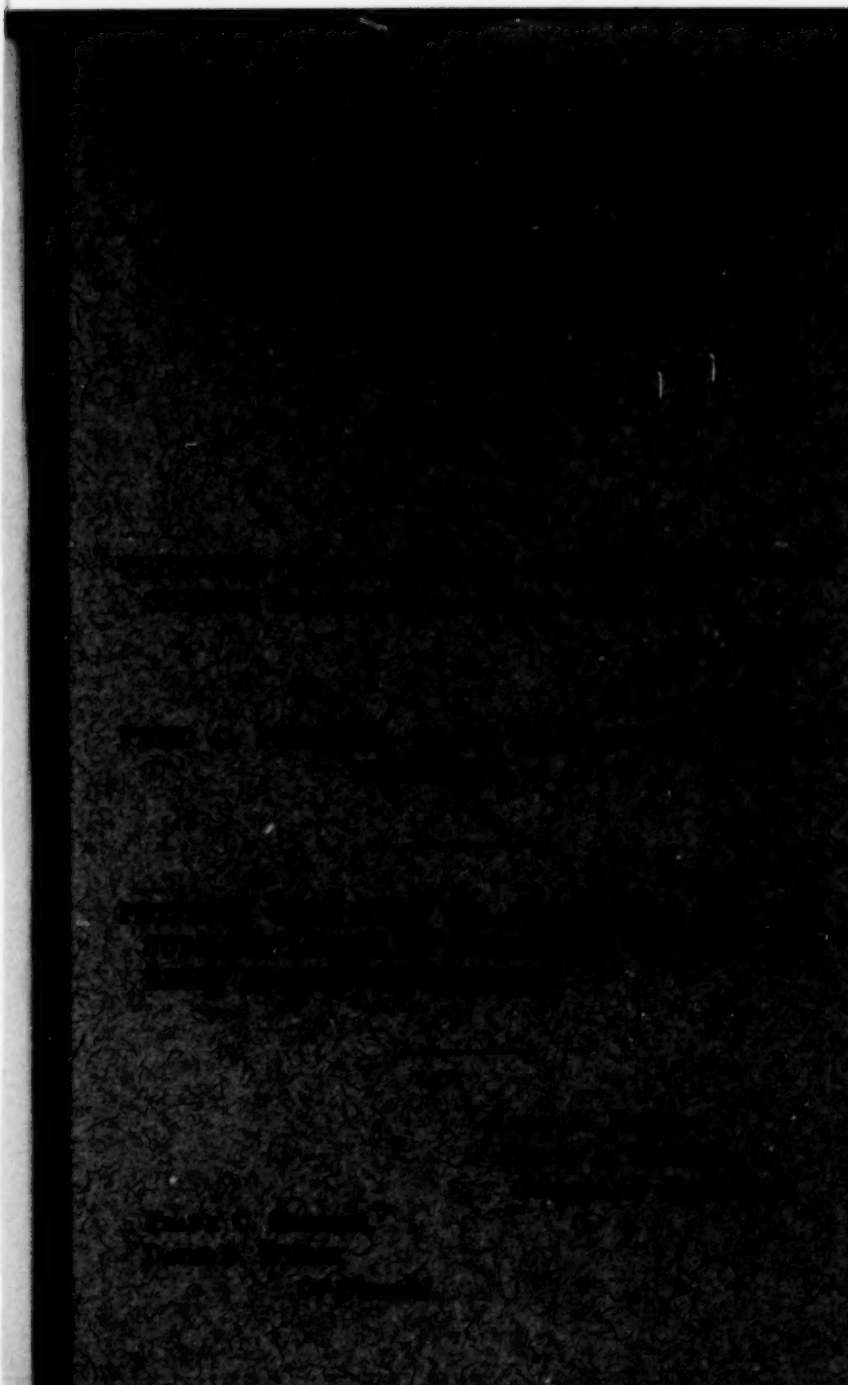
vs.

The Trustees of the Monroe Avenue Church of Christ, et al., Defendants-Appellants

Stipulation as to Record

The parties hereto agree that the testimony taken at the trial and included in the Bill of Exceptions is not essential to the proceedings in this Court and therefore agree that all of the matter contained in the Bill of Exceptions, as appearing in the records pages 42 to 148 inclusive need not be printed and are omitted from the records herein by agreement.

Davies & Davies, Attorney for Plaintiff-Appellees, by John L. Davies, Jr. Frank C. Shearer, Attorney for Defendant-Appellants.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 153

TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, INDIVIDUALLY AND COLLECTIVELY; THE MONROE AVENUE CHURCH OF CHRIST, A CORPORATION; AND LLOYD C. DICKERSON,

Petitioners,

vs.

FRED C. PERKINS, EARL McCULLOUGH, DRELL MURLETTE, G. P. MOHR, MILDRED MERCURIO AND MOLLEY E. VICE,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners respectfully pray that a writ of certiorari issue to review a judgment and order of the Supreme Court of the State of Ohio dismissing Petitioners' Appeal as of Right from the Court of Appeals of Franklin County, Ohio, and thereby affirming, in effect, a final judgment for the

Respondents, plaintiffs below, in the Common Pleas Court of Franklin County, Ohio.

A

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code 344b).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Ohio, the court of last resort in said State, on March 5, 1947 (R. 3), and Petitioners' Motion for a Rehearing was denied on the 26th day of March, 1947 (R. 3). The judgment of the Supreme Court of the State of Ohio is not reported officially. It appears in the record at page 3. The opinion of the Court of Appeals for Franklin County, Ohio is not reported officially, but is reported unofficially in 70 N. E. (2d) 487, and is also filed herein as a part of the record (R. 15-23).

Summary Statement of the Matter Involved

1. *Suit and the Parties thereto:*

This proceeding originated in the Court of Common Pleas of Franklin County, Ohio, and prayed for an order enjoining the defendants below, Petitioners here, from using or occupying the real property which had been purchased by the petitioning corporation (R. 57), from selling, leasing or otherwise disposing of said property to any person other than a member of the Caucasian race (R. 58), and to enjoin the Petitioner, Dickerson, or any other person than a member of the Caucasian race from occupying said property (R. 58).

The trial court found that the petitioner, Dickerson, the present occupant of the premises, and his family, are "the kind of persons usually known as colored" (R. 47), and is "part negro" (*sic*) (R. 34, 42).

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The trial court had previously found that the Monroe Avenue Church of Christ was a religious corporation not for profit duly organized under the laws of the State of Ohio (R. 34) and has a congregation "largely made up of (*sic*) colored people" but not exclusively so (R. 34).

Respondents here, the plaintiffs below, allege (R. 57) and the findings of both the trial and the appellate courts (R. 15, 34) demonstrate that the real party in interest in these proceedings, so far as Petitioners here and defendants below are concerned, is the Monroe Avenue Church of Christ, a non-profit corporation organized under the laws of Ohio. The defendant Trustees below, Petitioners here, have only a nominal interest. The Petitioner, Lloyd C. Dickerson, is a minister of the gospel, appointed by the corporate Petitioner and occupies the premises in dispute only as an officer, agent, servant, or employee of the corporate Petitioner as part compensation for his services to such corporate body (R. 42).

Prior to the present suit the corporate petitioner purchased, through the petitioning trustees, as agents, the improved parcel of residential property located in the City of Columbus, County of Franklin and State of Ohio, more fully described as No. 93 North Ohio Avenue, Columbus, Ohio (R. 42). The corporate petitioner is the owner of record title to the property in fee simple and occupied it for corporate purposes (R. 42). Petitioner Dickerson occupies the property only as an employee of the corporate petitioner (R. 42).

In this action Respondents sought an injunction restraining Petitioners from holding, occupying or using the premises in question. Respondents obtained a decree below requiring Petitioners to abstain from use or occupancy of the said premises by the Petitioner Dickerson or by any other person not of the Caucasian race and from violation of a

race restrictive covenant upon said property, which said covenant is fully set forth herein in the Record at Pages 16, 17.

2. *Theory and Factual Basis of the Suit*

There is no dispute as to the essential facts (See Stipulations (R. 59). On or about January 15, 1926, Paul Scofield, predecessor in title of the corporate petitioner, together with approximately 28 other residents of the same block of North Ohio Avenue between Long and Broad Streets in Columbus, Ohio, executed a certain agreement, the pertinent parts of which are as follows:

> "Said grantee, as a part of the consideration for this conveyance, and for the mutual benefit of all of the owners of the lots on the east and west sides of North Ohio Avenue, between the first alley north of East Broad Street and the first alley south of East Long Street, and of every other present and subsequent owner of a lot or lots in the territory above described for himself and his heirs, hereby covenants and agrees with the said grantor herein, its successors and assigns, that at no time prior to January 1, 1960, shall any lot or part of a lot, or interest in any of the premises located on Ohio Avenue, as aforesaid, be leased, rented, sold or conveyed to any person or persons of any race other than Caucasian, nor shall any such person or persons other than Caucasian be permitted to occupy the same during that period, *except as a servant of the occupant of any of the said premises.*" (Italics ours.)
>
> "And it is expressly agreed that if said grantee, his heirs, executors, administrators or assigns, or anyone holding or claiming by, through or under any of them, shall violate this condition, then these presents and this conveyance shall become null and void, and all the right, title, interest and estate in said premises shall immediately revert to and be reinvested in the grantor hereof, its successors and assigns, and it shall be seized as of its former estate herein as if these presents had

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never been executed, and may immediately re-enter, re-possess and hold said premises as of a good estate in fee simple, and the grantor hereof hereby gives and grants to the present owners of any or all of the other lots in the location fronting on Ohio Avenue in the territory above described, their heirs, executors, administrators and assigns, on a violation of the condition or restriction aforesaid, the right by proper legal proceedings to enforce the above condition, restriction and reversion. And the grantee hereof, by accepting this deed agrees to and with any or all of the owners of the other lots or parcels fronting on Ohio Avenue in the territory above described, their heirs, administrators, executors and assigns, that they or anyone or more of them may enforce by proper legal proceedings the aforesaid condition, restrictions and reversion; and the above condition and restriction shall until January 1, 1960, be considered as running with the aforesaid real estate hereby conveyed and shall be made a part of all deeds and conveyances, instruments, leases, transfers, assignments and agreements made by the said grantee, his heirs, executors, administrators or assigns, or any of them of said premises."

This agreement was subsequently filed and recorded in the Recorder's Office, Franklin County, Ohio, in Deed Record, Vol. 810, at page 643 (R. 41).

The corporate petitioner herein purchased the premises in question on or about June 29, 1945 from persons holding as mesne purchasers and successors in title from said Scofield, who was a signatory to the restrictive agreement complained of (R. 57). The Respondents are all signatories to the original aforesaid agreement as to restriction on ownership, use or occupancy or are successors in title, through mesne conveyances, to the signatories thereof (R. 57).

The original petition of Respondents (Complainants below) was filed on August 16, 1945, and the amended peti-

tion, on which this cause proceeded to final judgment and order, was filed on February 8, 1946 (R. 55).

The trial court found (R. 34), and the Court of Appeals affirmed (R. 15-23) as matters of fact and law:

> 1. That the corporate petitioner, The Monroe Avenue Church of Christ, the real party in interest herein, is a corporation, and, as such, is an artificial person without race or color, and is therefore not within the prohibitions or restrictions of the aforesaid covenant.
>
> 2. That a covenant or restriction upon the acquisition or ownership of real property other than by a member of the Caucasian race is in violation of the Rule against Restraint upon Alienation and is therefore unenforceable under the Constitution and laws of the State of Ohio, and contrary to the public policy of said State, and is not applicable to any of the Petitioners herein.
>
> 3. That the covenant or restriction upon use or occupancy by any person other than a member of the Caucasian race is valid and enforceable.

There were cross appeals in the Court of Appeals and in the Supreme Court of the State of Ohio (R. 11, 5). The Court of Appeals for Franklin County, Ohio, denied both appeals and sustained the trial court (R. 11). Petitioners here apply for the Writ of Certiorari from the final order of the Supreme Court of the State of Ohio sustaining the proposition last above stated (i. e. No. 3).

B

Questions Presented

I

Whether failure and refusal of the Supreme Court of the State of Ohio to consider and pass upon constitutional questions affecting the rights of the Petitioners, duly and

seasonably raised below, is a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States, and of the Constitution and laws of the State of Ohio.

II

Whether judicial enforcement of a restriction against the use of land by Negroes constitutes a violation of the Fourteenth Amendment to the Constitution of the United States and of the Constitution and laws of the State of Ohio.

III

Whether any agreement restricting the use of land by members of racial or religious minorities is against the public policy of the United States.

All of the foregoing questions were seasonably and properly raised in the Franklin County Court of Common Pleas, in the Court of Appeals for Franklin County, and in the Supreme Court of the State of Ohio. The Court of Appeals, admitting that there is no governing statute in Ohio upon the questions presented (R. 21), rests its decision upon an analogy of doubtful authenticity (R. 21), *State, ex rel. etc.,* v. *Trustees,* 126 O. S. 290, and the Doctrine of *stare decisis,* improperly based upon decisions of other and foreign jurisdictions (R. 21-23). The Supreme Court of the State of Ohio, being the court of last resort, refused and failed to recognize that there were questions of great and grave constitutional importance and of great public concern raised and that it owed Petitioners the constitutional duty of deciding them.

C

Reasons Relied upon for the Allowance of the Writ

1. Failure and refusal of the Supreme Court of the State of Ohio to pass upon the constitutional questions raised below is violative of the Constitution and laws of the United States.

(a) "—nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment, Constitution of the United States.

(b) The Constitution, laws and decisions of the State of Ohio are all declaratory of the right of the Petitioners herein to have an appeal as of right from the Court of Appeals to the Supreme Court where a constitutional question is involved.

"• • • "It '(the Supreme Court of the State of Ohio), shall have • • • appellate jurisdiction *in all cases* arising under the Constitution of the United States or of this State • • •" (Italics ours).

Art. IV, Sec. 2, Constitution of the State of Ohio.

"Except as to the judgment or final order of the court of appeals or a judge thereof, in cases involving questions under the Constitution of the United States or of this state,—no appeal shal be filed in the Supreme Court • • • without • • • leave • • •."

Section 12223:29—Throckmorton's Ohio Code, Anno. (1940 Baldwin's Certified Revision).

See also:

Hoffman v. *Stately*, 92 O. S. 505, 112 N. E. 1084 (1915);

Weiner v. *State*, 118 O. S. 129, 160 N. E. 623 (1928).

2. Judicial enforcement of the agreement in question is violative of the Constitution and laws of the United States.

(a) The right of a citizen to use, occupy and enjoy his property is guaranteed by the Constitution and laws of the United States.

Section 1, Fourteenth Amendment to the Constitution of the United States.

Ward v. *Maryland*, 12 Wall. 418;
The Slaughterhouse Cases, 16 Wall. 36;
Buchanan v. *Warley*, 245 U. S. 60.

(b) The deprivation by a state of any of the constitutionally guaranteed or protected rights is prohibited, whether such deprivation occurs by reason of an act of the legislature or by judicial decision or enforcement.

Ex parte Virginia, 100 U. S. 339;
Virginia v. *Rives*, 100 U. S. 313;
Chicago, B. & Q. Ry. Co. v. *Chicago*, 166 U. S. 226;
Raymond v. *Chicago Traction Co.*, 207 U. S. 20;
Buchanan v. *Warley, supra;*
Mooney v. *Holohan*, 294 U. S. 103;
American Federation of Labor v. *Swing*, 312 U. S. 321.

(c) The agrement in question, even though a private contract between private parties, being derogatory of fundamental rights, cannot exact the aid of the state judiciary to enforce its terms.

Home Bldg. & Loan Assoc. v. *Blaisdell*, 290 U. S. 398;
Norman v. *B. & O. R. R. Co.*, 294 U. S. 240;
Gandolfo v. *Hartman*, 49 Fed. 181;
Kennett v. *Chambers*, 14 How. 38.

(d) Assuming that the covenant in question is enforceable as written, the decision of the courts below to the effect that the corporate petitioner, the real party in interest herein, is a person without race or color and may own the

property but denying it the right of user to the individual petitioner, Dickerson, is a deprivation of property without due process of law.

Peoples Pleasure Park Co. v. *Rohleder,* 109 Va. 429, 61 S. E. 794;

Continental Tyre & Rubber Co., Ltd., v. *Daimler Co., Ltd.,* 1 K. B. (1915), 893.

(e) The issues raised by this application have never been decided by this Court.

Corrigan v. *Buckley,* 271 U. S. 323;

Smith v. *Allwright,* 321 U. S. 649;

Mays v. *Burgess, et al.,* — U. S. — (cert. den.) May 28, 1945 (No. 1208).

cf. Dissent in *Hurd* v. *Hodge* and *Urciolo* v. *Hodge,* Nos. 9196 and 9197, U. S. Court of Appeals for the District of Columbia, May 26, 1947.

3. Private restrictions or covenants against the use of land by racial or religious minorities are contrary to the public policy of the United States and are unenforceable.

Section 1, Fourteenth Amendment to the Constitution of the United States;

The Slaughterhouse Cases, supra;

Strauder v. *West Virginia,* 100 U. S. 303;

Tunstall v. *Brotherhood of Firemen, etc.,* 323 U. S. 210;

Steele v. *Louisville & N. R. Co.,* 323 U. S. 192;

In re Drummond Wren, 4 D. L. R. 674;

The United Nations Charter, Preamble and Articles 55 and 56;

Gandolfo v. *Hartman, supra;*

Kennett v. *Chambers, supra.*

Investigations, reports and studies of sociologists, students in race relations, city planning and prevention of crime and juvenile delinquency have all indicated that our national problems in these areas have been intensified by

the practices of persons, such as the Respondents herein, through the type of restrictive covenants against Negroes and other minority groups, such as herein complained of, which confine these groups to certain predetermined ghettos and thereby condemn them to a type of economic existence which is inimical to the welfare of the nation as a whole. The problem thus presented by the present application for a Writ of Certiorari becomes one of grave, great and immediate public concern to the Nation at large and demands the decision of this tribunal on the facts presented.

In support of the foregoing grounds of application, the petitioners submit herewith the accompanying Brief setting forth in detail the pertinent facts and arguments applicable to such Petition.

Petitioners, through their attorneys in this Court, expressly state that this application is filed in good faith and not for purposes of delay.

Conclusion

WHEREFORE, it is respectfully submitted that this Petition for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Ohio be granted.

LEON A. RANSOM,
AUSTIN L. FICKLING,
Attorneys for Petitioners.

FRANK C. SHEARER,
DAVID D. WHITE,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 153

TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST, INDIVIDUALLY AND COLLECTIVELY; THE MONROE AVENUE CHURCH OF CHRIST, A CORPORATION; AND LLOYD C. DICKERSON,

Petitioners,

VS.

FRED C. PERKINS, EARL McCULLOUGH, DRELL MURLETTE, G. P. MOHR, MILDRED MERCURIO AND MOLLEY E. VICE,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO.

Opinion of the Court Below

The opinion of the Supreme Court of the State of Ohio is unreported. It appears in the record at page 3. The opinion of the Court of Appeals of Franklin County, Ohio, is unofficially reported in 70 N. E. (2nd) 487, and also appears in the record at pp. 15-23.

Jurisdiction

The jurisdiction of the Court is invoked under Section 237 of the Judicial Code, as amended (28 U. S. Code 344 (b)).

The judgment sought to be reviewed was entered by the Supreme Court of the State of Ohio on March 5, 1947 (R. 3), and application for rehearing was denied on March 26, 1947 (R. 3).

Statement of the Case

The statement of the case, and the statement of the salient facts from the record appear in the accompanying petition for certiorari.

Errors Below Relied upon Here

I. The Supreme Court of the State of Ohio failed and refused to examine and pass upon questions of constitutional law properly raised before it.

II. The judicial branch of the state government has imposed and enforced restrictions against ownership and occupancy of property in violation of the Constitution and the laws of the United States and the State of Ohio.

III. The judicial branch of the state government, by upholding restrictions against use of property by racial minorities, has decided that covenants requiring such restrictions are not contrary to the public policy of the state and of the United States.

Summary of Argument

I. The failure and refusal of the Supreme Court of the State of Ohio to pass upon the constitutional questions raised below is violative of the Constitution and laws of the United States and of the State of Ohio.

II. Judicial enforcement of the agreement in question is violative of the Constitution and laws of the United States.

A. The right of a citizen to occupy, use and enjoy his property is guaranteed by the Constitution and laws of the United States.

B. Deprivation of the constitutional guarantee of protection of rights is prohibited, whether such deprivation occurs by reason of legislative or judicial action.

C. The judiciary is without power to enforce private contracts which are in derogation of fundamental rights.

D. Assuming, without admitting, the enforceability of the covenant in question, the decision of the courts below to the effect that corporate petitioner may not use the property as it sees fit is a taking of property without due process of law.

E. The issues here involved have not heretofore been decided by this Court.

III. Restrictions against the use or occupancy of land by members of racial minorities is contrary to the public policy of the United States.

ARGUMENT

I

The Failure and Refusal of the Supreme Court of the State of Ohio to Pass upon the Constitutional Questions Raised below Is Violative of the Constitution and Laws of the United States and of the State of Ohio.

The petitioners have a right of appeal from the decision of the Court of Appeals of Franklin County, affirming the decision of the Court of Common Pleas of Franklin County, duly filed in season and in proper form (R. 1-3). The right

to appeal from the decision of an inferior court in Ohio is unlimited where a constitutional question is involved.

> "• • • It • • • shall have • • • appellate jurisdiction in all cases arising under the Constitution of the United States or of this State • • •."
>
> Article 4, Section 2, Constitution of the State of Ohio.

It was obviously the intention of the framers of the constitution, and certainly of the codifiers of the present code operating in the State, that this appeal should lie without exception, whenever a constitution question was raised, in the trial court.

> "Except as to the judgment or final order of the Court of Appeals or a judge thereof, in cases involving questions under the Constitution of the United States or of this State,—no appeal shall be filed in the Supreme Court • • • without • • • leave • • •."
>
> Sec. 12,223-29 Throckmorton's Ohio Code, Anno. (1940 Baldwin's Certified Revision).

It is obvious from the language of both the Constitution and the statute that the Supreme Court of the State was charged with a mandate to review and pass upon any debatable constitutional question raised properly in the inferior courts. There is no question but that controversial and debatable constitutional problems were raised below. The Court of Appeals, in its decision at R. 21, says that questions here presented have not been heretofore decided by the courts of Ohio. There can be no question of such problems not having been decided by this Court. Obviously the matters are debatable.

The cases of *Hoffman* v. *Stately*, 92 O. S. 505, 112 N. E. 1084, and *Weiner* v. *State*, 118 O. S. 129, 160 N. E. 623, are declarative, by inference, that the Supreme Court of the

State of Ohio cannot escape its duty of passing upon the constitutional rights of its citizens whenever questions are properly raised.

The stipulation entered herein by Counsel below leaves no doubt as to whether questions of constitutional issues are present before the Court. Its failure to consider these questions in and of itself amounts to a denial of due process to the petitioners.

II

Judicial Enforcement of the Agreement in Question Is Violative of the Constitution and Laws of the United States

A. *The Right of a Citizen to Occupy, Use and Enjoy His Property Is Guaranteed by the Constitution and Laws of the United States.*

The corporate petitioner was and still is the owner in fee simple of the premises in question. The trial court found, and the appellate court affirmed, that petitioner, being a corporation, is a "person" without race or color and is therefore not within the prohibitions of the covenant in question. Moreover, it was found, and affirmed below, that that portion of the covenant in question which prohibits the ownership of property by a person "other than of the Caucasian race" violates the rule against restrictions upon alienation and would, for that reason, be inapplicable. The net result, therefore, of the decisions below is to hold that the Monroe Avenue Church of Christ is the legal holder of the title to the property but that it is not entitled to the use, occupancy or enjoyment thereof—all significant parts of the *dominium*.

The right of user, being the most important portion of the *dominium*, must be protected under the first section of the 14th Amendment to the Constitution of the United

States, and its necessary protection has been announced repeatedly by this Court.

See:

Ward v. *Maryland*, 12 Wall. 418;
Slaughter House Cases, 16 Wall. 36;
Buchanan v. *Warley*, 245 U. S. 60.

It is immaterial whether the privilege of user or enjoyment of property is inherent in or protected by the state or federal statutes; under either view interference therewith by the state government is prohibited by the 14th Amendment.

B. *Deprivation of the Constitutional Guarantee of Protection of Rights is prohibited, whether such deprivation occurs by reason of legislative or judicial action.*

It is hardly necessary to labor this brief with argument to the effect that action by the judiciary is as much state action as if it were had by the legislature itself. This Court has long since decided, and we believe is committed to, the proposition that judicial action, whether by way of decision, interpretation, or enforcement of laws or a private contract, is action by the state itself. Certain it is that state action, where it deprives any citizen or person of his rights without due process or equal protection of the law, must be struck down under the terms of the 14th Amendment to the Constitution.

Buchanan vs. *Warley, supra,* definitely answered the question for all time when the Court stated (245 U. S. 78, 82):

> "The concrete question here is: May the occupancy and, necessarily, the purchase and sale of property of which occupancy is an instance, be negated by the

states, or by one of its municipalities, solely because of the color of the occupant of the premises?——

"—The 14th Amendment, and this statute enacted in furtherance of the purpose, operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color.——

"We think this attempt to prevent alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing State interference with property rights except by due process of law.—"

Harmon vs. *Tyler*, 273 U. S. 668, and *Deans* vs. *Richmond*, 281 U. S. 704, have reached the same conclusion.

The Court will take judicial notice of the many cases, among them those cited above, which have held that the prohibitions of the 14th Amendment apply to judicial action as well as to legislative action. If, as this Court has stated, a state is without power to pass legislation providing for discrimination between persons affecting their property rights, when such discrimination is based upon color or race, or upon some ground not properly cognizable by the courts, then it must follow that it may not, by judicial action, accomplish a result otherwise forbidden. This Court has stated that when a State court grants an injunction against peaceful picketing on the ground that such conduct is forbidden by the comomn law of the State, its action has the same effect as if the legislature had forbidden such conduct and would therefore be in violation of the 14th Amendment. (*American Federation of Labor* vs. *Swing*, 312 U. S. 321; *Bakery Drivers Local* vs. *Wohl*, 315 U. S. 769.) Again, this Court has stated that conviction of an alleged offender of inciting a breach of peace under a

"judge made" law of the State is to be condemned exactly as if the conviction were obtained by virtue of a statute.

Cantwell vs. *Connecticut*, 310 U. S. 296.

See also: *Bridges* vs. *California*, 314 U. S. 252; and *Chicago B. & Q. Railroad Company* vs. *Chicago*, 166 U. S. 226.

It is the contention of the petitioner herein that it is of no moment whether action is initiated by the Legislature, as in *Buchanan* v. *Warley, supra*, or by private individuals, as in the instant case; it must and does rely upon the state judiciary to carry out the design to deprive persons of the use or enjoyment of property solely because of their race or color.

C. The Judiciary is without power to enforce private contracts which are in derogation of fundamental rights.

Assuming that the agreement in question is merely a private contract between private parties, entered into without governmental influence or interference, it still must depend for its enforcement upon governmental action through the judiciary. Petitioners contend that the right to the use and occupancy of the land which they have properly acquired is one that is protected by both the Constitution and laws of the United States (see *Buchanan* vs. *Warley, supra*). Any agreement on the part of individuals which would tend to interfere with this use would be in derogation of fundamental rights which are guaranteed by the Constitution and which have been specifically protected by action of the Congress of the United States. No enforcement of a covenant in derogation of these rights and of this Congressional action can, therefore, be given by a State court. Congress has protected this right by

making it a felonious conspiracy to injure or oppress petitioner in the exercise thereof. Section 51 of Title 18 of the United States Code provides:

> "If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exerecised the same—they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any place of honor, profit, or trust created by the Constitution or laws of the United States."

There is no doubt that a written agreement, solemnly executed, and recorded as a deed, by a group of property owners to the effect that a person shall be deprived of his constitutional right to acquire and use property solely because of his race and color, is evidence of the highest order that there has been effected, between the signatories thereto a conspiracy to deprive the person affected of a right secured to him by the Constitution and laws of the United States.

The specific question at bar has been passed upon by a Federal District Court in Arkansas. In the case of *United States* v. *Morris*, 125 Fed. 322, after showing that by virtue of the Thirteenth Amendment, Congress had the power to enact this legislation regarding the acts of individuals, the court proceeded to discuss the validity of an indictment of certain defendants who had conspired to keep Negroes from the right to lease and cultivate private lands. In an elaborate and scholarly review of the history of the Act, the court came to the conclusion that a mere agreement to keep Negroes out of lands was the very type of act prohibited by the legislation, and concluded:

> "That the rights to lease lands—are fundamental rights inherent in every citizen, is indisputable; and a

> conspiracy by two or more persons to prevent Negro citizens from exercising these rights because they are Negroes is a conspiracy to deprive them of a privilege secured to them by the Constitution and the laws of the United States, within the meaning of Section 5508, Rev. St. U. S. (U. S. Comp. St. 1901, p. 3712)" (at 331)

From this argument only one conclusion can be deduced —the covenant in question constitutes a conspiracy to violate the laws and the Constitution of the United States. May a court, acting as an arm of the federal government, lend its aid to the enforcement of a criminal agreement to deprive a citizen of one of his privileges or immunities of citizenship? Only one answer can be given to this question, and this Court has unmistakably given that answer, when, speaking through Chief Justice Taney in *Kennett, et al.*, v. *Chambers*, 14 How. 38, it said:

> "The question is—whether such a contract, made at that time, within the United States, for the purposes stated in the contract and the bill of complaint, was a legal and valid contract, and such to entitle either party to the aid of the courts of justice of the United States to enforce its execution—."
>
> "for as the sovereignty resides in the people, every citizen is a portion of it, and is himself personally bound by the laws which the representatives of the sovereighty may pass—within the scope of their delegated authority—. It is his own personal compact as a portion of the sovereignty in whose behalf it is made. And he can do no act, nor enter into any agreement to promote or encourage revolt or hostilities against the territories of a country with which our government is pledged by treaty to be at peace, without the breach of his duty as a citizen, and the breach of the faith pledged to the foreign nation. *And if he does so he cannot claim the aid of a court of justice to enforce it;—our own freedom cannot be preserved without obedience to our own laws, nor social order preserved if the judicial*

branch of the government countenanced and sustained contracts made in violation of the duties which the law imposes—.'' (at 49, 50) (Italics added)

The position here taken by Chief Justice Taney has never been questioned. In fact, it cannot be questioned except by revolution. The signatories to the covenant at bar are likewise parties to Article IV, and Amendments V and XIV of the Constitution and to Sections 41, 42, Title 8, United States Code and Section 51, Title 18, United States Code. They obviously contradict each other and cannot stand together. The lesser in dignity, the private agreement, must yield to the paramount authority of their public compact. Any other conclusion is to say that not only will this Court permit respondents to deny their solemn adherence to the Constitution and laws of the United States, but at the same time give their criminal agreement in violation thereof the sanction of a rule of property.

Speculation is unnecessary. The courts of the United States have already spoken on the matter. It has been unanimously held that conspiracies such as here involved cannot be enforced through the medium of the very agencies designed to protect citizens in their privileges and immunities. The leading case is *Gandolfo* v. *Hartman*, 49 Fed. 181. There the court held that a covenant restricting *the lease of property to others than those of the Chinese race was:*

> "* * * contrary to public policy of the government, in violation of a principle, embodied in its constitution. *Such a contract is absolutely void and should not be enforced in any court—certainly not in a court of equity of the United States.* (Italics added)

The principle announced there has been consistently adhered to. Federal courts have repeatedly refused to enforce contracts which embody provisions violative of our Constitution or laws. See: *Fox* v. *Gardner*, 21 Wall. 475; *The*

Spartan, 25 Fed. 44; *Ex Parte Reeves*, 121 Fed. 848; *The Fri*, 154 Fed. 333; *Grossman* v. *Union Trust Co.*, 228 Fed. 610; *Lakos* v. *Saliaris*, 116 Fed. (2d) 440. State courts have taken similar views of the problem. See: *Lee* v. *Boise Development Co.*, 21 Idaho 461, 122 Pac. 851; *Porter et al.*, v. *Barrett et al.*, 233 Mich. 373, 206 N.W. 532, L.R.A. 1916B, 1208, 1209; 9 A.L.R. 120, *et seq.* The rules of the common law are too well known to require any citations. Individuals never have had the right of absolute freedom of contract in the sense that judicial recognition and enforcement of their private agreements may be had when such agreements run counter to the general welfare and the public policy of the sovereign. Usurious, gambling, immoral contracts are all illustrative of the principle that the courts will not lend their aid to the enforcement of such agreements.

D. *Assuming, Without Admitting, the Enforceability of the Covenant in Question, the Decision of the Courts Below to the Effect that Corporate Petitioner May Not Use the Property as It Sees Fit, Is a Taking of Property Without Due Process of Law.*

Assuming, without conceding, that the covenant in question is enforceable, the courts below have taken an untenable position. Having first found that the corporate petitioner has a right to the ownership of the property, that it is without color or race, and therefore not within the prohibitions of the restrictive covenant, it next finds that the corporation is denied the use of its property for corporate purposes because the person placed therein is "part negro (Sic)." The court fails to pass upon the question of whether the occupant, Petitioner Dickerson, who is admittedly a minister of the Gospel employed by the corporate petitioner, is a servant, agent, or employee of the corporation. If he be such a servant, then the covenant itself, by its express terms,

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permits his occupancy of the premises. The courts below, by their findings, have inferentially ruled that the corporation, a person without color, can own and occupy the premises for corporate purposes but that they cannot do so if that occupancy be by a servant other than "Caucasian." This holding contradicts the provisions of the covenant.

More important, the courts below have said, as pointed out above, that the corporation may own but may not enjoy the property. Ownership without use is of no value.

E. *The Issues Here Involved Have Not Heretofore Been Decided by This Court.*

It has frequently been assumed that racial restrictive covenants are enforceable as a result of the decision of this Court in the case of *Corrigan* v. *Buckley* (55 Appeals D. C. 30; 299 Fed. 899; App. den. 271 U. S. 323). A re-examination of what was said in that case makes it apparent that the problems now present here were then neither present nor decided.

In that case, about 30 white persons, including the plaintiff and defendant Corrigan, who were the owners of 25 parcels of land, executed and recorded an indenture in which they mutually covenanted that no part of the properties covered would ever be sold to or occupied by Negroes. A year later, defendant Corrigan entered into a contract to sell to defendant Curtis, a Negro, a house and lot situated within the restricted area. Plaintiff thereupon brought suit to enjoin the sale to and occupancy by defendant Curtis. Both defendants moved to dismiss the bill upon grounds which did not question the constitutional propriety of judicial enforcement of the covenant. The motions were denied and an appeal to the Court of Appeals for the Dis-

trict of Columbia taken, where the issue was stated as follows:

> "• • • The sole issue is the power of a number of landowners to execute and record a covenant running with the land, by which they bind themselves, their heirs and assigns, during a period of 21 years, to prevent any of the land described in the covenant from being sold, leased to, or occupied by Negroes."

Following an affirmance of the decree, an appeal to this Court was taken under the provisions of Section 250 of the Judicial Code. This Court stated the issue as follows:

> "Under the pleadings in the present case the only constitutional question involved was that arising under the assertions in the motions to dismiss that the indenture or covenant which is the basis of the bill is 'void' in that it is contrary to and forbidden by the 5th, 13th and 14th Amendments. • • •"

In dismissing the appeal for want of jurisdiction, this Court said:

> "And, while it was further urged in this Court that the decrees below in themselves deprived the defendants of their liberty and property without due process of law, in violation of the 5th and 14th Amendments, this contention likewise cannot serve as a jurisdictional basis for the appeal. Assuming that such a contention, if of a substantial character, might have constituted ground for an appeal under paragraph 3 of the Code provision, it *was not raised* by the petition for the appeal or by any assignment of error, either in the Court of Appeals or in this Court; and it is likewise lacking in substance. • • •
>
> "Hence, without a consideration of these questions, the appeal must be, and is, dismissed for want of jurisdiction." (Italics supplied.)

It must be concluded, therefore, that the constitutionality of judicial enforcement of such an agreement was not decided in *Corrigan* v. *Buckley*.

While the *Corrigan* decision contains an intimation by way of dictum that no constitutional question is presented by the facts of that case, it is to be remembered that this Court was not then committed to the doctrine that common law determinations of courts can constitute reviewable violations of the due process clause. But the Court is now committed to that doctrine.

The Court has additional reason for reinterpreting its decision in the *Corrigan* case.

> "In constitutional questions, where correction depends upon amendment and not upon legislative action this Court throughout its history has freely exercised its power to re-examine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. *This is particularly true when the decision believed erroneous is the application of a constitutional principle* rather than an interpretation of the Constitution to extract the principle itself." (Emphasis supplied.)

III

Restrictions Against the Use or Occupancy of Land by Members of Racial Minorities Is Contrary to the Public Policy of the United States.

It is not amiss at this time to call the Court's attention to the fact that enforcement of private contracts which are designed for, and tend toward restriction upon the use of property by persons of minority races, is violative of the principles publicly announced and specifically adhered to by this country in its subscription to the United Nations

charter, Articles 55, 56, and to the Preamble of that charter which says:

> "We, the people of the United Nations, determined to save succeeding generations from the scourge of war, • • • and reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of man and woman and of nations large and small • • • and for these ends to practice tolerance and live together in peace with one another as good neighbors • • •"

The above quoted noble sentiment is no more than a fulfillment of the doctrines of Jefferson and the other forefathers of our nation. It was never believed by them that our government would lend itself to the enforcement of racial discriminatory practices which would set our peoples one against another.

This Court needs no reminder, and will take judicial notice, of the fact that housing conditions are the prime source of many of the evils that confront us today. Juvenile delinquency, race riots, and our present low standards of health and sanitation, are all largely due to the fact that minority peoples are herded into ghettos, not by reason of state legislation but by reason of private contracts such as this, which are judicially enforced. When the government lends its judicial arm to this type of action it becomes *particeps criminis* and must share the blame for the evils that result with those that set them in motion.

Conclusion

It is respectfully submitted that this problem is one of great and serious concern. It affects a large segment of the population of this [illegible]on which is illy housed and which has no recourse against the acts of individuals save a pronouncement of this court to the effect that the judicial en-

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forcement of such restrictive covenants, designed to operate against minority groups, is violative of the Constitution of the United States and cannot be sustained.

In view of the seriousness of the problem and necessity for a determination of this question by the highest tribunal in this land, it is respectfully prayed that a writ of certiorari may issue as requested in the accompanying petition.

Respectfully submitted,

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MAY 10, 1948.

Per Curiam Decisions.

No. 153. TRUSTEES OF THE MONROE AVENUE CHURCH OF CHRIST ET AL. *v.* PERKINS ET AL. On petition for writ of certiorari to the Supreme Court of Ohio. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Shelley* v. *Kraemer* and *McGhee* v. *Sipes*, 334 U. S. 1. MR. JUSTICE REED, MR. JUSTICE JACKSON, and MR. JUSTICE RUTLEDGE took no part in the consideration or decision of this case. *Leon A. Ransom* and *Austin L. Fickling* for petitioners. Reported below: 147 Ohio St. 537, 72 N. E. 2d 97.